(15)

No. 99-1680-CSX Title: City News and Novelty, Inc., Petitioner
v.
City of Waukesha

Docketed: April 18, 2000 Court: Court of Appeals of Wisconsin, District II

Entry	Date	Proceedings and Orders
	Apr 17 2000	Petition for writ of certiorari filed. (Response due May 18, 2000)
	May 15 2000	Brief of respondent City of Waukesha in opposition filed.
	May 30 2000	DISTRIBUTED for Conference of June 15, 2000
	Jun 19 2000	Petition GRANTED. limited to Question 3 as presented by the petition. SET FOR ARGUMENT November 28, 2000. **********
	Jul 21 2000	Order extending time to file petitioner's brief on the merits to and including August 25, 2000. Order extending time to file respondent's brief on the merits to and including October 13, 2000. A reply brief, if any, is due on or before November 13, 2000.
	Jul 27 2000	Motion of the parties to dispense with printing the joint appendix filed.
	Aug 24 2000	Order extending time to file petitioner's brief on the merits to and including August 31, 2000; respondent's brief on the merits is extended to and including October 26, 2000; the reply brief is due on or before November 13, 2000.
	Aug 24 2000	Brief amici curiae of American Booksellers Foundation for Free Expression, et al. filed.
	Aug 25 2000	Brief amicus curiae of Liberty Project filed.
	Aug 28 2000	Motion of the parties to dispense with printing the joint appendix GRANTED.
	Aug 30 2000	Brief amicus curiae of Florida Cannabis Action Network, Inc. filed.
	Aug 31 2000	Brief of petitioner City News and Novelty, Inc. filed.
	Aug 31 2000	Brief amicus curiae of American Charities for Reasonable Fund Raising Regulation filed.
	Oct 3 2000	Record filed.
	Oct 4 2000	Record filed.
	Oct 25 2000	Brief amici curiae of Morality in Media, Inc., et al. filed.
	Oct 26 2000	Brief amicus curiae of Community Defense Counsel filed.
	Oct 26 2000	Brief amici curiae of Alabama, et al. filed.
	Oct 26 2000	Brief amicus curiae of National League of Cities, et al. filed.
	Oct 26 2000	Brief amicus curiae of United States filed.
	Oct 26 2000	Brief of respondent City of Waukesha, Wisconsin filed.
	Oct 26 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 31 2000	LODGING consisting of twenty-one sets of bound materials in three volumes submitted by counsel for the respondent.
	Nov 2 2000	CIRCULATED.

2 pp

No. 99-1680-CSX

Entry	Date	Proceedings and Orders
	Nov 6 2000	Application (00A412) to extend the time to file petitioner's reply brief on the merits until November 21, 2000, submitted to Justice Stevens.
	Nov 6 2000	Respondent's letter in opposition to petitioner's application to extend the time to file petitioner's reply brief on the merits.
	Nov 7 2000	Application (00A412) granted by Justice Stevens extending the time to file until November 21, 2000.
	Nov 9 2000	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argumentDISTRIBUTED.
	Nov 13 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 21 2000	Reply brief of petitioner City News and Novelty, Inc. filed.
	Nov 21 2000	LODGING consisting of twenty one bound copies of related documents submitted by counsel for the petitioner and distributed.
	Nov 28 2000	ARGUED.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHICH PARTY BEARS THE BURDEN OF PERSUASION WHEN A LITIGANT CHALLENGES, AS AN UNCONSTITUTIONAL PRIOR RESTRAINT, A MUNICIPAL ORDINANCE WHICH REQUIRES A SPEAKER TO OBTAIN A CITY LICENSE BEFORE ENGAGING IN EXPRESSIVE ACTIVITY PROTECTED BY THE FIRST AMENDMENT?

II. IS A LICENSING SCHEME WHICH ACTS AS A PRIOR RESTRAINT REQUIRED TO CONTAIN EXPLICIT LANGUAGE WHICH PREVENTS THE EXERCISE OF UNBRIDLED DISCRETION IN FIXING THE PENALTIES FOR ITS VIOLATION?

III. IS A LICENSING SCHEME WHICH ACTS AS A PRIOR RESTRAINT REQUIRED TO CONTAIN EXPLICIT LANGUAGE WHICH PREVENTS INJURY TO A SPEAKER'S RIGHTS FROM WANT OF A PROMPT JUDICIAL DECISION?

PARTIES

The Petitioner is City News and Novelty, Inc., a Wisconsin corporation, the plaintiff in the circuit court, the appellant in the Wisconsin Court of Appeals, and the petitioner in the Wisconsin Supreme Court. City News and Novelty, Inc., has no parent corporation or subsidiaries.

The Respondent is the City of Waukesha, Wisconsin, a Wisconsin municipality, the licensing entity, the defendant in the circuit court, the appellee in the Wisconsin Court of Appeals, and the respondent in the Wisconsin Supreme Court.

The State of Wisconsin has not been a party to the proceedings below, the Attorney General of the State of Wisconsin has been served with documents throughout the proceedings in order to give the State an opportunity to appear and defend the challenged provisions, as is required by Wisconsin state law. (See *State ex. Rel. Smith v. City of Oak Creek*, 131 Wis. 2d 451, 457, 389 N.W.2d 366, 368 (Ct. App. 1986), affirmed 139 Wis. 2d 788, 407 N.W.2d 901 (1987)).

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the Wisconsin Court of Appeals, in *City News and Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 604 N.W.2d 870 (Ct. App. 1999), which was given binding effect in the State of Wisconsin by the decision of the Wisconsin Supreme Court to deny review on January 18, 2000.

OPINIONS BELOW

The order of the Wisconsin Supreme Court is unpublished and is reproduced in the Appendix to this petition. The decision of the Wisconsin Court of Appeals is published as *City News and Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 604 N.W.2d 807 (Ct. App. 1999), and is reproduced in the Appendix to this petition.

The Wisconsin Court of Appeals entered its decision on October 20, 1999. The petitioner sought review by the Wisconsin Supreme Court, and its petition for review was denied January 18, 2000.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech. . . . "

STATUTES INVOLVED

Chapter 68 of the Wisconsin Statutes governs municipal administrative procedure and review of municipal administrative decisions. The provisions of Chapter 68 are reproduced in the Appendix to this Petition.

ORDINANCES INVOLVED

The City of Waukesha, Wisconsin, regulates adult oriented establishments by means of a municipal licensing ordinance, § 8.195. The provisions of Waukesha Ordinance § 8.195 are reproduced in the Appendix to this Petition.

STATEMENT OF THE CASE

City News and Novelty, Inc., operates an adult bookstore in the City of Waukesha, Wisconsin. In years past, City News and Novelty, Inc., has annually renewed its license to operate as an adult business under the

provisions of § 8.195, A-3-4,[1] of the Municipal Code of the City of Waukesha. Its most recent license was due to expire January 25, 1996. On November 15, 1995, City News and Novelty, Inc., applied for renewal of its license. On December 19, 1995, the Common Council of the City of Waukesha denied renewal of its license. A-7.

City News and Novelty, Inc., pursued administrative review of the Council's decision.[2] On January 22, 1996, the Common Council reviewed and affirmed its previous decision. A-72. The Waukesha Administrative Review Appeals Board ("Board") affirmed the City's denial of the license. A-81. City News and Novelty, Inc., sought judicial review via a statutory certiorari action in state court. There, City News and Novelty, Inc., argued that the action of the City in failing to renew its license was unlawful because the licensing ordinance was an unconstitutional prior restraint. In a decision filed April 2, 1997, the circuit court confirmed that City News and Novelty, Inc., had properly preserved its arguments concerning the facial invalidity of the ordinance for review, but rejected those arguments on the merits, and affirmed the decision of the Board. A-55. City News and Novelty, Inc., appealed.

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[1] References to the Appendix to this Petition will be shown as A-___.

[2] Because an administrative body does not have the power to declare an ordinance or a statute unconstitutional, at this stage of the proceedings City News and Novelty, Inc., merely noted its constitutional objections, listing the specific constitutional infirmities alleged in order to preserve the constitutional issues for judicial review.

After receiving the briefs of both parties, the Court of Appeals certified the appeal to the Wisconsin Supreme Court. A-44. By order of April 21, 1998, the Wisconsin Supreme Court refused certification. A-53. The Court of Appeals issued its decision October 20, 1999, A-1. It found that one section of Waukesha's licensing ordinance, § 8.195(3)(b), which governs an applicant's right to a public hearing following denial of a license, was unconstitutional, but also found that provision severable. It upheld the remainder of the ordinance, and therefore, in significant part, affirmed the decisions of the trial court and of the Board.

The Wisconsin Court of Appeals held that although ordinarily when an ordinance regulates First Amendment activities, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt, this Court, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-230 (1990), "rejected this approach where First Amendment prior restraints are concerned and the government action at issue is the review of an applicant's qualifications for a business operating license." A-10. Using this standard, the Court of Appeals found that City News and Novelty, Inc., had not met its burden to demonstrate that the ordinance either permitted unbridled discretion as to the granting and denying of licenses, or that it lacked the required procedural safeguards of prompt administrative and judicial review. City News and Novelty, Inc., filed a timely Petition for Review to the Wisconsin Supreme Court. By order dated January 18, 2000, the Wisconsin Supreme Court denied review. A-54.

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN COURT COMPROMISED AN IMPORTANT FIRST AMENDMENT SAFEGUARD WHEN IT INTERPRETED *FW/PBS, INC. V. CITY OF DALLAS* TO REQUIRE ONE WHO CHALLENGES A LICENSING SCHEME, WHICH ACTS AS A PRIOR RESTRAINT, TO BEAR THE BURDEN OF PROOF IN DEMONSTRATING THAT THE ORDINANCE VIOLATES THE FIRST AMENDMENT.

When the Wisconsin Court of Appeals broke with all First Amendment precedent and transferred the burden of persuasion to City News and Novelty, Inc., requiring it to prove beyond a reasonable doubt that Waukesha's licensing ordinance was an unconstitutional prior restraint, it did so because it believed its holding was required by *FW/PBS, Inc. v. City of Dallas*, 333 U.S. 215 (1990). This Court should issue its writ of certiorari to correct the misconception upon which this error is based. This Court should clarify that *FW/PBS* did not, in fact, alter the long-standing rule that where a party challenges a regulation that restricts the exercise of freedoms protected by the First Amendment, the government bears the burden of justifying the restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Freedman v. Maryland*, 380 U.S. 51 (1965).

A. It Is Unlikely that this Court Intended to Alter The Allocation of the Burden of Proof.

The language in *FW/PBS, Inc. v. City of Dallas*, 333 U.S. 215 (1990) cited by the Wisconsin Court of Appeals as the basis for its imposing upon the petitioner the burden of proving the ordinance to be unconstitutional is found in the portion of Justice O'Connor's plurality opinion where the Dallas licensing scheme is distinguished from the censorship system at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965). The Wisconsin Court gave no indication that it knew it was relying on a non-majority opinion. A-10. That three-justice plurality opinion says:

> The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. . . . The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicants obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a licensing application or that it bear the burden of proof once in court.

FW/PBS, 493 U.S. at 229.

The distinction which the plurality was discussing in this portion of its opinion was twofold: First, in general, the licensing authority does not pass judgment on the content of the protected expression, and second, the licensee has a much greater incentive to seek judicial

review in the face of an adverse ruling than did the individual film producer in *Freedman*. As to the latter point, it makes some sense to require the applicant seeking the license to initiate any court action. However, as to the former, it is one thing to require the applicant to bear the burden of proof on the issues of fact going to its own qualifications, but it is quite another to require that it bear the burden of proof or persuasion in regard to a facial challenge to the validity of the regulation itself.

The language used by Justice O'Connor in other sections of the same opinion belies any intent to shift from the government the burden of justifying the restriction on First Amendment freedoms. For example, an earlier portion of the same section of the opinion begins "while '[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.' " *Id.* at 225 (multiple citations omitted). To say that a system of prior restraint, including a scheme of licensing adult bookstores, bears a heavy presumption against its constitutional validity is another way of saying that it is the government that bears the burden of justifying the regulation. *See*, for example, *Clark v. Community for Creative Nonviolence*, 468 U.S. at 294, n.5, where this Court explained that the general rule that one who seeks relief bears the burden of demonstrating entitlement to it means that one who claims that a regulation impinges on activity protected by the First Amendment bears the burden of establishing that the activity is in fact protected by the First Amendment; once that is established, the government bears the burden of justifying its restrictions.

Lower courts have consistently interpreted the "presumption of unconstitutionality" as requiring the government to bear the burden of demonstrating the validity of a regulation that functions as a prior restraint. See, for example, *Jersey's All-American Sports Bar, Inc. v. Washington State Liquor Control Board*, 55 F. Supp. 2d 1131, 1138 (1999): "The government can only overcome this presumption by demonstrating that the prior restraint includes procedural safeguards designed to protect against abuse of the power to censor. . . . To avoid a finding that a statute grants unbridled discretion, the government must show that it includes narrow, objective, and definite standards for the granting or denial of the license," citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

Given the *FW/PBS* plurality's reiteration that the prior restraint there bore a heavy presumption of unconstitutionality, it is highly unlikely that the plurality intended to do away with such a presumption. More likely, it was the intention of the plurality to say that while the municipality retained the burden of justifying its restriction in the face of a facial challenge to the validity of the ordinance, the license applicant should assume the burden on any challenge to its qualifications to hold a license.

B. The Requirements of *Freedman* Are Still Binding Precedent.

The position that a licensing ordinance does not require all three *Freedman* safeguards was advanced by Justice O'Connor in § II of her plurality opinion in *FW/PBS*. Only Justices Stevens and Kennedy joined that section of the opinion. Three justices, Brennan, Marshall, and Blackmun, concurred in the judgment that the Dallas ordinance was unconstitutional but believed that none of the *Freedman* requirements may be eliminated in the context of a licensing regulation which restricts First Amendment freedoms. Those justices argued that the "transcendent value of speech" always requires that the burden of persuasion be placed on the government when expression is regulated. *FW/PBS*, 493 U.S. at 238, citing *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Chief Justice Rehnquist and Justice White, concurring and dissenting, would not have applied any *Freedman* safeguards to a licensing situation, and Justice Scalia, dissenting, would have applied a different analysis entirely.

When a "fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764, n.9 (1988), citing *Marks v. United States*, 430 U.S. 188, 193 (1977). Therefore, *FW/PBS* may not properly be read as requiring that the safeguards set forth in *Freedman* have been modified, since that rationale neither enjoyed the assent of the majority nor was the narrowest ground for the decision.

There was a single rationale, though, enjoying the assent of six Justices, that completely explains the result in *FW/PBS*. Six Justices agreed that the Dallas ordinance was unconstitutional because it was a prior restraint requiring at least two of the three *Freedman* procedural

safeguards, and those two safeguards were lacking. *11126 Baltimore Boulevard v. Prince George's County, Maryland*, 58 F.3d 988, 999, n.15 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010. In short, the requirements established by this Court in *Freedman* have not been modified and are therefore still binding on the states.

The fact that this court has been unable to muster a majority opinion in some First Amendment cases concededly makes life more challenging for lower court judges. Each Justice of this court no doubt tries hard to move toward consensus, at least to the point of enabling the court to issue a majority opinion, before reluctantly accepting the fact that conscience requires a separate statement. This court has also instructed the lower courts, in *Marks*, *City of Lakewood*, and elsewhere, on how to determine the authoritative holdings of such cases.

For a court whose decisions become the law of a state to disregard these instructions and simply treat a plurality opinion as if it were a majority holding, just because it appears first in the reporters, is a serious matter. It not only begets error in the case at hand, but it sends a message to trial-level courts and lawyers that they may simply dispense with the arduous vote counting required by a *Marks* analysis, and treat a lead plurality opinion as if it were a majority opinion. This court should grant certiorari in this case to nip this practice in the bud, in recognition of the value of the sincere exercise of conscience that sometimes compels a Justice of this court to write separately, even where this choice means the court will not produce a majority opinion, and lawyers and judges will have to read carefully and count votes.

II. WAUKESHA'S LICENSING ORDINANCE DOES NOT CONTAIN EXPLICIT, OBJECTIVE STANDARDS TO PREVENT THE EXERCISE OF UNLAWFUL DISCRETION.

A licensing scheme which acts as a prior restraint must exhibit not only the three *Freedman* procedural safeguards, but it must also contain "narrow, objective and definite standards to guide the licensing authority" in deciding who gets licenses and who does not get them. *Shuttlesworth v. Birmingham*, 394 U. S. 147, 150-151 (1969). "It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.*, at 151 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)).

In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759-760 (1988), this court recognized that discretion in the granting or denying of required periodic license renewals can be every bit as effective a cloak for the censorship of unpopular speech as discretion in the granting or denying of new licenses.

Some licensing schemes empower licensing authorities to respond to violations of their lawful regulations by imposing temporary prohibitions on licensees' rights to engage in the licensed expressive activity. It is self-evident that standardless discretion as to the duration of such a temporary prohibition can be every bit as much a

cloak for censorship as standardless discretion in the granting or denying of new licenses or annual renewals. A licensing authority might respond to unpopular speech by imposing a long suspension or even a permanent revocation for a trivial violation. An ordinance which permits a licensing authority to censor by back-door suspensions without standards to govern the severity of the penalties it imposes is necessarily every bit as facially objectionable as one which permits front-door censorship in the granting or denying of a license in the first place.

A. Provisions which Allow the City to Choose Between Mild and Severe Punishments Without Standards to Guide that Choice Confer Unbridled Discretion Upon City Officials.

Under Waukesha's ordinance, if an operator commits a violation, the ordinance gives the city unbridled discretion to determine whether such a violation will be punished by a revocation, which lasts for a maximum of one year, or by nonrenewal of a subsequent license, which lasts for five years. A-36. The ordinance lists no criteria by which the city is governed in making this choice. A-104-106. Before the Wisconsin courts, the city defended the absolute discretion its scheme vests in city officials as to severity of punishment for violations. A-35.

Without standards to prevent subjective criteria from being used as the basis for deciding which penalty to invoke, the ordinance does not protect a bookstore from being subject to the danger of censorship. Nothing in the

language of the ordinance prevents the city from choosing the most severe penalty because of its distaste for the materials disseminated. Because such a decision would not only be unconstitutional, but also virtually undetectable, *see, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988), it is necessary that the ordinance contain explicit provisions which would make such an occurrence impossible. The *Lakewood* Court cautioned that demonstrating the link between the expressive content and the subsequent denial of license renewal might well prove impossible. *Id.* at 759-760. Thus, the dangers inherent in the Waukesha ordinance, which contains no explicit standards and permits subjective discretion to be exercised in determining what penalty to apply after a violation has occurred are exacerbated in circumstances where, as here, a store selling unpopular expressive material must seek renewal on an annual basis.

This court should grant certiorari to make it clear to government entities that standardless discretion at any phase of a licensing scheme where the right to speak is in play violates the First Amendment.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER THE GUARANTEE OF PROMPT JUDICIAL REVIEW THAT MUST ACCOMPANY A LICENSING SCHEME MEANS A PROMPT JUDICIAL DETERMINATION OR SIMPLY THE RIGHT TO PROMPTLY FILE FOR JUDICIAL REVIEW.

The Waukesha licensing ordinance comes up short of constitutionally mandated procedural safeguards in

another way. Another element which this Court has found essential in an ordinance which restricts freedom of expression by licensing it is "prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 228 (O'Connor, J., plurality opinion). As the Wisconsin Court of Appeals noted in its decision, there is currently a split among the federal appellate circuit courts as to whether "prompt judicial review" means merely speedy access to, or initiation of, judicial review, or alternatively, whether it means a prompt judicial decision. A-21-22. The Court of Appeals went on to resolve this issue by holding that "prompt judicial review" means prompt access to court. A-22. This court should grant the requested writ in order to resolve this serious conflict among the circuits.

A. The Court Should Grant Certiorari to Consider the Role that Preserving the Status Quo May Play When A Municipality Lacks the Power to Require a State Court to Determine a License Case Promptly.

One reason the Wisconsin court was reluctant to hold that prompt judicial review means a prompt judicial decision was that it was dealing with a local ordinance, and the Waukesha City council lacks the authority to impose time requirements on Wisconsin's state courts. A-22. What Waukesha can do, though, is to guarantee that the status quo will be maintained throughout the pendency of judicial review proceedings. In the case of an existing business, like the Petitioner here, such a provision would in most cases keep the business from suffering any injury from an adverse licensing decision until such time as the

courts finally determine the matter. The purpose behind the requirement of prompt judicial review would be served, even though the ordinance could only afford prompt access to court. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.").

In the instant case, the City of Waukesha *ad hoc* permitted City News to continue operating without interruption throughout much of the judicial review process. However, every bookstore is entitled to *explicit* protection in this regard, and need not simply rely on the charity or kindness of city officials. In reiterating the "essential" safeguards, this Court has required "the licensor to make the decision whether to issue the license within a specified and reasonable period of time during which the status quo is maintained." *FW/PBS*, 493 U.S. at 228 (O'Connor, J., plurality opinion). Even the Fifth Circuit Court of Appeals, one of the circuits which has taken a narrow approach to the issue of prompt judicial review, agrees on the need to preserve the status quo by explicit language:

> The contention is that the County cannot constitutionally shut down an existing business while its application for a license is pending, and that TK's was operating when Denton County adopted its regulations. The County points out that it has not attempted to close TK's. . . .
>
> Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process. It is no answer that the County has not elected to do so.

> The absence of constraint internal to the regulation is no more than open-ended licensing. Businesses engaged in activity protected by the First Amendment are entitled to more than the grace of the state. . . .
>
> Because TK's was in business when the Order was adopted, its free speech activity cannot be suppressed pending review of its license application by the County.

TK's Video v. Denton County, 24 F.3d 705, 708 (5th Cir. 1994).

The court in *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1574 (D. Minn. 1992) also held that even if the city has not attempted to force an applicant out of business during the pendency of proceedings, the retention of the status quo must be *explicit* in the ordinance itself. *Wolff*, 803 F. Supp. at 1574-75. The Fourth Circuit, too, has held that not only must the status quo be explicitly preserved throughout the administrative stage, but that it is preferable to extend it through the judicial review stage. *Chesapeake B&M, Inc. v. Harford County, Maryland*, 58 F.3d 1005, 1009 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010 (1995); *Baltimore Blvd.*, 58 F.3d at 1001. And the Eleventh Circuit reminds us that the requirement that the status quo be maintained through at least the administrative process is one of the basic requirements which stems from *Freedman*. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363 (11th Cir. 1999).

The Waukesha ordinance not only fails to explicitly provide for the retention of the status quo; in fact, on its face, it says the opposite, at § 8.195(2)(b), A-101, which

states, "[N]o adult establishment shall be operated . . . without first obtaining a license to operate." When the lack of preservation of the status quo is coupled with the lack of definitive time limits and the attendant possible delay in judicial review, the Waukesha ordinance has the potential for long-term suppression of expression prior to any type of judicial review. As a result, it is constitutionally defective on its face. This court should grant certiorari to assist those government entities that wish to regulate adult businesses within the constitutional boundaries of their power to do so, by more clearly defining those boundaries in this notoriously murky area, and in particular, by more clearly stating the meaning of "prompt judicial review" and illuminating the interplay between the concept of prompt judicial review and retention of the status quo during administrative and judicial proceedings in license cases.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be, in all respects, granted.

Dated this 17th day of April, 2000.

Respectfully submitted,

CITY NEWS AND NOVELTY, INC.

Petitioner

By

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COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1504

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CITY NEWS & NOVELTY, INC.,

PLAINTIFF-APPELLANT,

v.

CITY OF WAUKESHA,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed in part and reversed in part.*

Before Nettesheim, Anderson and Snyder, JJ.

¶ 1 SNYDER, J. City News and Novelty, Inc. (City News) appeals from a circuit court judgment affirming the City of Waukesha's (the City) decision not to renew City News's license to operate an adult-oriented establishment. City News raises the following issues on appeal. First, it contends that the City's adult establishment licensing scheme is unconstitutional because it fails to offer explicit standards for license renewal, provides inadequate time limits for judicial review, fails to preserve the status quo throughout the administrative process and does not permit prompt judicial review. Second, City News raises due process arguments claiming that it was deprived of an impartial administrative review, that it was given inadequate notice of the allegations against it and that the City improperly invoked the most severe sanction of nonrenewal. Finally, it contends that the grounds for nonrenewal were insufficient as a matter of law.[1]

¶ 2 While we find City News's arguments unavailing in large part, we conclude that § 8.195(3)(d) of the CITY OF WAUKESHA, WIS., MUNICIPAL CODE (1995) (hereinafter MUNICIPAL CODE), providing an applicant the right to a public hearing, is constitutionally infirm. However, because the public hearing provision of § 8.195(3)(d) is severable from the remainder of the ordinance, we reverse as to this provision and affirm as to the remainder.

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[1] We certified the issues of preservation of the status quo, prompt judicial review and imposition of the most severe municipal sanction to the supreme court. *See* RULE 809.61, STATS. The supreme court, however, declined to take the case.

BACKGROUND

¶ 3 City News is an adult-oriented establishment in the city of Waukesha which sells, rents and otherwise makes available to its customers sexually explicit books, magazines, videotapes and other materials. It also provides viewing booths in which its customers may view videotapes.

¶ 4 City News is licensed annually under the provisions of § 8.195 of the MUNICIPAL CODE.[2] Licensure is

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[2] The pertinent provisions of CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195 (1995), include the following:

> (2) LICENSE. (a) [N]o adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.
>
> . . . .
>
> (3) APPLICATION FOR LICENSE. (a) Any person desiring to secure a license shall make application to the City Clerk. . . .
>
> . . . .
>
> (c) Within 21 days of receiving an application for a license, the City Clerk shall notify the applicant whether the application is granted or denied.
>
> (d) Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.
>
> . . . .

required for an individual or a corporation to operate or maintain an adult-oriented establishment. *See id.* § 8.195(2)(a). An application to renew a license must be filed no later than sixty days before the license expires.

---

(4) STANDARDS FOR ISSUANCE OF LICENSE. To receive a license to operate an adult oriented establishment, an applicant must meet the following standards:

. . . .

(b) If the applicant is a corporation:

1. All officers, directors, and stockholders required to be named under par. (3)(b) shall be at least 18 years of age.

2. No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section 5 years immediately preceding the date of the application.

. . . .

(7) RENEWAL OF LICENSE OR PERMIT. (a) Every license issued pursuant to this section will terminate at the expiration of one year from date of issuance, unless sooner revoked and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed not later than 60 days before the license expires. The application for renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.

. . . .

(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.

(d) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.

. . . .

(9) PHYSICAL LAYOUT OF ADULT ORIENTED ESTABLISHMENT. Any adult oriented establishment having available for customers, patrons or members, any booth, room or cubicle for the private viewing of any adult entertainment must comply with the following requirements:

(a) *Access.* Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult oriented establishment and shall be unobstructed by any door, lock or other control-type devices.

(b) *Construction.* Every booth, room or cubicle shall meet the following construction requirements:

1. Each booth, room or cubicle shall be separated from adjacent booths, rooms or cubicles and any non-public areas by a wall.

2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same.

. . . .

(c) *Occupants.* Only one individual shall occupy a booth, room or cubicle at any time. No occupants of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

See id. § 8.195(7). The city clerk shall notify the applicant whether the application is granted or denied within

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(d) *Inspections.* The Building Inspector shall conduct monthly inspections of the premises to insure compliance with the provisions of this subsection.

(10) RESPONSIBILITIES OF THE OPERATOR. (a) Every act or omission by an employee constituting a violation of the provisions of this Section shall be deemed the act or omission of the operator if such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.

. . . .

(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.

(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

twenty-one days of the application's receipt. *See id.* § 8.195(3)(c).

¶ 5 For a corporate applicant, the licensure standards state that no officer, director or stockholder "shall have been found to have previously violated this section 5 years immediately preceding the date of the application." *Id.* § 8.195(4)(b)2. The ordinance then sets forth specific requirements for the physical layout and the conduct of patrons and employees of the establishment which, among other things, provide that: (1) every viewing booth or room must have at least one side entirely open to the public,[3] (2) no patron may engage in any type of sexual activity, and (3) no employee may permit a minor to loiter around or patronize the establishment. *See id.* § 8.195(9)(b)2, (9)(c), (10)(c).

¶ 6 On November 15, 1995, City News applied for renewal of its license which was due to expire on January 25, 1996. On December 19, 1995, the common council passed a resolution finding that City News had committed several code violations and therefore denied its renewal application. The violations included permitting minors to loiter on the premises, failing to maintain an unobstructed view of the viewing booths and allowing patrons to engage in sexual conduct inside the booths.

¶ 7 After City News requested review of the resolution, the common council affirmed the decision. City

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[3] City News has previously challenged the City's open booth policy. In *See City News & Novelty, Inc. v. City of Waukesha,* 170 Wis.2d 14, 23, 487 N.W.2d 316, 319 (Ct. App. 1992).

News sought administrative review, and on June 28, 1996, the City of Waukesha Administrative Review Appeals Board affirmed the common council's decision. City News then filed a certiorari action in the circuit court seeking judicial review of the denial of its license renewal application. In an April 2, 1997 decision, the circuit court affirmed the board's determination. City News appeals.[4]

STANDARD OF REVIEW

¶ 8 In an action for certiorari review, appellate review is the same as in the trial court. *See* ***State ex rel. Wilson v. Schocker,*** 142 Wis.2d 179, 183, 418 N.W.2d 8, 9 (Ct. App. 1987). We confine our review to whether: (1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question. *See* ***State v. Goulette,*** 65 Wis.2d 207, 215, 222 N.W.2d 622, 626 (1974). The primary issues raised in this case involve constitutional questions

[4] We note that in ***Suburban Video, Inc. v. City of Delafield,*** 694 F. Supp. 585 (E.D. Wis. 1988), the District Court for the Eastern District of Wisconsin addressed the constitutionality of a licensing scheme identical in relevant part to the City of Waukesha's. There, the court found the City of Delafield's ordinance constitutional except for a provision requiring disclosure of an applicant's detailed personal information. *See id.* at 592. While the court did not specifically address the issues raised here, we nevertheless remark that the licensing scheme was upheld as being narrowly tailored and furthering a substantial governmental purpose. *See id.* at 589 (citing ***City of Renton v. Playtime Theatres, Inc.,*** 475 U.S. 41 (1986)).

and questions of statutory construction which are questions of law that we review de novo. *See* ***City of Waukesha v. Town Bd.,*** 198 Wis.2d 592, 601, 543 N.W.2d 515, 518 (Ct. App. 1995); ***State v. Migliorino,*** 150 Wis.2d 513, 524, 442 N.W.2d 36, 41 (1989).

DISCUSSION

A. First Amendment Protections

¶ 9 City News raises a number of facial challenges to the constitutionality of the City's licensing scheme. "Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." ***FW/PBS, Inc. v. City of Dallas,*** 493 U.S. 215, 223 (1990).

¶ 10 ***FW/PBS*** is the United States Supreme Court's most recent articulation of the constitutional principles that apply to municipal licensing schemes implicating First Amendment rights. The Court held that a licensing scheme that exists as a prior restraint on businesses purveying sexually explicit but protected speech is constitutionally permissible if it contains safeguards to minimize the possibility that the licensing procedure will be used to suppress speech. *See* **id.** at 226. The Court then set forth several requirements that licensing ordinances must follow to pass constitutional scrutiny. First, the regulatory scheme cannot place "unbridled discretion in the hands of a government official or agency." ***Id.*** at 225 (quoting ***City of Lakewood v. Plain Dealer Publ'g Co.,*** 486 U.S. 750, 757 (1988)). In other words, if a permit or license may

be granted or withheld solely at the discretion of a government official, this is an "unconstitutional censorship or prior restraint" upon the exercise of the freedom of speech. *See id.* at 226. Second, "a prior restraint that fails to place limits on the time within which the decision-maker must issue the license is impermissible." *Id.* A licensing decision must be made "within a specified and reasonable time period during which the status quo is maintained." *Id.* at 228. Finally, a regulatory scheme must provide for "prompt judicial review" in the event that a license is erroneously denied. *See id.*

¶ 11 We apply the constitutional framework in ***FW/PBS*** to our examination of the City's licensing scheme. In doing so, we note that although ordinances normally receive a presumption of constitutionality which the challenger must refute, when the ordinance regulates First Amendment activities "the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt." ***County of Kenosha v. C & S Management, Inc.***, 223 Wis.2d 373, 383, 588 N.W.2d 236, 242 (1999). Wisconsin courts have routinely applied this burden-shifting approach in First Amendment cases. *See, e.g., id.; **Lounge Management, Ltd. v. Town of Trenton,*** 219 Wis.2d 13, 20, 580 N.W.2d 156, 159 (1998); ***Town of Wayne v. Bishop,*** 210 Wis.2d 218, 231, 565 N.W.2d 201, 206 (Ct. App. 1997). ***FW/PBS***, however, rejected this approach where First Amendment prior restraints are concerned and the government action at issue is the review of an applicant's qualifications for a business operating license. The ***FW/PBS*** Court explained its reasoning in the following passage, distinguishing its licensing scheme from the scheme in ***Freedman v. Maryland,*** 380 U.S. 51 (1965).

> The Court . . . required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in ***Freedman***. In ***Freedman,*** the censor engaged in direct censorship of particular expressive material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in ***Freedman*** was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court. Under the Dallas ordinance [in ***FW/PBS***], the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. The Court in ***Freedman*** also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in ***Freedman***, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. *Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a*

> *license application or that it bear the burden of proof once in court.*

FW/PBS, 493 U.S. at 229-30 (emphasis added). The licensing ordinance at play here is the same type that was before the Court in ***FW/PBS***. Both involve the ministerial act of assessing license applications; however, neither engages in direct censorship or entails the "exercise [of] discretion by passing judgment on the content of any protected speech." ***Id.*** at 229. Consequently, we conclude that the burden does not shift to the City to defend the ordinance's constitutionality.

1. Renewal Standards

¶ 12 City News first contends that the ordinance is unconstitutional because it fails to provide explicit standards for license renewal. This argument goes to the issue of whether the ordinance permits "unbridled discretion." Because we conclude that the ordinance contains specific guidelines for renewal, we reject City News's argument.

¶ 13 Our review begins with subsec. (7) of the ordinance, entitled "RENEWAL OF LICENSE OR PERMIT," which contains several guidelines for renewal. *See* MUNICIPAL CODE § 8.195(7). Every license terminates after one year and must be renewed before operation is permitted for the following year. *See id.* § 8.195(7)(a). The applicant for renewal must provide a $250 renewal fee, the building must be inspected prior to renewing the license and the City of Waukesha Police Department must file with the city clerk any information it finds bearing on the operator's qualifications. *See id.* § 8.195(7)(b), (c), (d). The application "shall contain such information and data

given under oath or affirmation as is required for an application for a new license." *Id.* § 8.195(7)(a). City News contends that because the subsec. (7) standards fall under the "RENEWAL" heading, these are the only guidelines that apply for renewal and that the standards found under subsec. (4), entitled "STANDARDS FOR ISSUANCE OF LICENSE," only apply to the issuance of *new* licenses. We disagree.

¶ 14 At first blush, the ordinance appears to contain discrete subsections on issuance, revocation and renewal of licenses because each of these procedures has a separate heading. However, when read as a whole, it is clear that the standards of issuance are also meant to apply to renewal. Following the subsection on renewal are provisions addressing all matters of licensing. In particular, para. (10)(b) of the subsection entitled "RESPONSIBILITIES OF THE OPERATOR" states that

> [a]ny act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or *renewed*. [Emphasis added.]

Paragraph (10)(f) also provides that "[t]he operator shall insure compliance of the establishment and its patrons with *the provisions of this section*." (Emphasis added.) The phrase "the provisions of this section" comprises *all* regulations within the licensing scheme, whether falling under renewal subsec. (7) or not. As outlined earlier, the ordinance's guidelines under subsecs. (9) and (10) address the proper physical layout of the premises and the conduct of the operators, employees and patrons. City

News does not dispute the adequacy of these guidelines, and we are satisfied that they provide "narrow, objective, and definite standards to guide the licensing authority." ***Shuttlesworth v. City of Birmingham,*** 394 U.S. 147, 151 (1969). We therefore reject City News's argument that the scheme gives the City unfettered discretion to issue licenses.

¶ 15 Apart from the renewal standards, City News asserts that the ordinance is defective because it does not expressly state that a new license *must* be issued upon satisfaction of the new license standards. City News cites ***Wolff v. City of Monticello,*** 803 F.Supp. 1568 (D. Minn. 1992), for the proposition that a licensing scheme must direct the granting of a license when an applicant is not rendered ineligible under its standards.

¶ 16 In ***Wolff,*** the court reviewed a licensing ordinance for an adult-oriented establishment that instructed the city council to investigate each application and hold a public hearing. Following the hearing, the council had the unconditional power to "grant or refuse the application." ***Id.*** at 1573. The court determined that because the ordinance only provided guidelines as to which persons and places were *ineligible* for a license, there were no criteria establishing which persons and places were *eligible*. *See* ***id.*** at 1574. The court faulted this scheme because

> there [was] no provision in the ordinance requiring the city council to grant license applications for any person or place that is not rendered ineligible under [the ordinance]. Limits on discretion in licensing schemes must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-

> established practice." Thus, the city may neither rely on claims of implied limits nor ask the Court to write limits into a silent regulation.

Id. (quoting ***City of Lakewood,*** 486 U.S. at 770).

¶ 17 Unlike ***Wolff,*** the ordinance here has clear-cut standards for licensing. The applicant must not have violated any provision in the ordinance, including requirements pertaining to the physical layout of the establishment, the conduct of the patrons and the responsibilities of the employees and operator. While the ordinance does not contain a statement specifically requiring the granting of a license when the applicant is not rendered ineligible, the common council is not free to grant or deny applications at its whim. The ordinance's standards are plainly spelled out and are not contingent upon the type of "silent regulation" at play in ***Wolff***. *See* ***id.***

¶ 18 City News's reliance on ***City of Lakewood*** is also misplaced. There, the Supreme Court ruled unconstitutional a licensing ordinance that gave the mayor unbounded discretion to grant or deny applications and which merely required an explanation of the reasons for denial without the use of standards. *See* ***City of Lakewood,*** 486 U.S. at 769-72. ***City of Lakewood*** carries no weight here because the City's licensing scheme does set forth specific guidelines and expressly provides that a violation of such guidelines constitutes a ground for nonissuance or nonrenewal.

¶ 19 City News further contends that the ordinance is unconstitutionally vague and permits unbridled discretion because there are no rules defining the level of proof

of findings under MUNICIPAL CODE § 8.195(4)(b)2, the provision barring licensure in the event an applicant is "found" to have previously violated the ordinance. City News claims that the ordinance must establish whether the finding is to be a mere accusation, a municipal citation, a conviction in municipal court or a conviction in a court of record.

¶ 20 While the criteria for the common council's findings are clearly circumscribed by the ordinance, we agree that the scheme does not set forth levels of proof for the council's findings. However, City News cites no authority, and we can find none, that requires such direction. As the City points out, the common council is given the power "to act for the government . . . and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation . . . and other necessary or convenient means." Section 62.11(5), STATS. Within the council's power is the authority to make its own findings. While licensing ordinances must include narrow and detailed standards, City News presents no case law indicating that such standards extend to the level of proof of the municipality's findings. We therefore conclude that City News has failed to rebut the presumption of the ordinance's constitutionality on this issue.

2. *Inadequate Time Limits*

¶ 21 City News contends that the City's licensing scheme is defective because it does not prescribe mandatory time limits for the application process. We disagree.

¶ 22 The City's licensing ordinance requires that a license renewal application be filed at least sixty days before the license is due to expire. See MUNICIPAL CODE § 8.195(7)(a). Within twenty-one days of the application's receipt, the City "shall notify the applicant whether the application is granted or denied."[5] *Id.* § 8.195(3)(c). As part of the renewal process, "[i]f the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk." *Id.* § 8.195(7)(c). In addition, "[t]he building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance." *Id.* § 8.195(7)(d).

¶ 23 Despite the time sequence set forth above, City News contends that the filing of police information and the building inspection render the City's licensing scheme constitutionally defective because these conditions permit a delay in the application process beyond the prescribed time limits. While we agree that a licensing condition must place time limits on the issuance of the license, *see* ***FW/PBS***, 493 U.S. at 226, we are not persuaded that the ordinance fails here.

¶ 24 In ***FW/PBS***, the City of Dallas enacted a licensing scheme for sexually-oriented businesses giving the city police chief thirty days to accept a license application. *See id.* at 227. Issuance of the license was contingent

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[5] Although City News points out that the City did not give notice of its denial until thirty-five days after receipt of the application, this fact has no bearing on a facial challenge to the ordinance.

upon a building inspection for which there was no mandated time period. *See id.* Because there was no time limitation on the inspection and because the ordinance provided no means for an applicant to ensure inspection within the thirty-day application period, the Court concluded that the scheme was unconstitutional. *See id.*

¶ 25 In contrast to ***FW/PBS***, the building inspection and filing of police information here do not create a means for delaying the City's twenty-one day licensure period. First, while a building inspection is required, the ordinance provides that the inspection must occur "prior to the renewal of [the] license." MUNICIPAL CODE § 8.195(7)(d). The onus is on the building inspector to complete his or her inspection before the license is to be renewed. This provision does not compare to ***FW/PBS*** because the ordinance there simply stated that a license will not be issued if the premises "have not been approved by the health department, fire department, and the building official." ***FW/PBS***, 493 U.S. at 227.

¶ 26 Second, MUNICIPAL CODE § 8.195(7)(c) provides that the filing of police information is to occur only if the police are "aware of any information bearing on the operator's qualifications." Unlike the building inspection, the filing of police information is not compulsory. This provision, therefore, does not stand in the way of the twenty-one day approval deadline because the submission of information is solely at the discretion of the police department. We conclude, therefore, that the City's ordinance does not permit delays in the twenty-one day application period.

3. Preserving the Status Quo

¶ 27 City News contends that the ordinance is defective because it fails to explicitly require preservation of the status quo pending judicial review of a license denial or revocation. We conclude that while the ordinance does not contain a status quo provision, such language is unnecessary. What is important is that the status quo is maintained by the operation of the licensing scheme. The ordinance here does just that.

¶ 28 ***FW/PBS*** instructs that "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained." ***FW/PBS***, 493 U.S. at 228. As illustrated above, the licensing scheme in this case starts with a license renewal application deadline sixty days before the license's expiration date. Upon receipt of the application, the City then has twenty-one days to inform the applicant whether the application is accepted or denied. Through these provisions, a decision must be rendered at the very least thirty-nine days before the license is due to lapse. As the City points out, because the common council's review of an application is completed prior to expiration of the license, the status quo is automatically maintained. Therefore, because we do not read ***FW/PBS*** as requiring anything more than the effective preservation of the status quo during the period in which the licensor makes its decision, we conclude that the ordinance satisfies the constitutional safeguards.

4. *Prompt Judicial Review*

¶ 29 City News next asserts that the ordinance does not guarantee "prompt judicial review," as established by the Supreme Court in ***Freedman***. The ***Freedman*** Court held that a licensing scheme must "assure a *prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." ***Id.*** at 59 (emphasis added). "Any restraint imposed in advance of a *final judicial determination on the merits* must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." ***Id.*** (emphasis added).

¶ 30 While the ***Freedman*** Court apparently contemplated timely issuance of a final "decision" or "determination," more recently in ***FW/PBS*** the Court appears to have relaxed this requirement by emphasizing the "possibility" and "availability" of prompt judicial review. Justice O'Connor[6] wrote that "expeditious judicial review of that decision must be *available*" and that "there must be the *possibility* of prompt judicial review in the event that the license is erroneously denied." ***FW/PBS***, 493 U.S. at 227, 228 (emphasis added). In his concurrence to ***FW/PBS***, Justice Brennan, the author of the *Freedman* opinion, also

[6] Although the Court in ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215 (1990), was split (three-way) as to which, if any, of the ***Freedman*** procedural safeguards applied, a majority of the justices agreed that (1) the licensor should make its decision within a specified and reasonable time period during which the status quo is maintained and (2) a licensing scheme must guarantee prompt judicial review. *See* ***FW/PBS***, 493 U.S. at 227, 239.

stated that "a prompt judicial determination must be *available*." ***FW/PBS***, 493 U.S. at 239 (emphasis added). While we note this change in the Court's language, we also acknowledge that the Court has yet to squarely define the parameters of "prompt judicial review."

¶ 31 Since ***FW/PBS***, federal courts of appeal have been divided on the issue of "prompt judicial review." The Fourth, Sixth and Ninth Circuits hold the view that "prompt judicial review" means a timely judicial determination on the merits. *See* ***Baby Tam & Co. v. City of Las Vegas***, 154 F.3d 1097, 1101-02 (9th Cir. 1998); ***11126 Baltimore Blvd., Inc. v. Prince George's County***, 58 F.3d 988, 998-1001 (4th Cir. 1995) (en banc); ***East Brooks Books, Inc. v. City of Memphis***, 48 F.3d 220, 225 (6th Cir. 1995).[7] These courts have reasoned that because a person always has a judicial forum available when his or her speech is allegedly encroached, "to hold that mere access to judicial review fulfills [***Freedman's*** prompt review requirement] makes the safeguard itself meaningless." ***Baby Tam***, 154 F.3d at 1101.

¶ 32 In the First, Fifth and Seventh Circuits, the courts have taken the alternative approach that prompt *access* to judicial review qualifies as "prompt judicial review." *See* ***TK's Video, Inc. v. Denton County***, 24 F.3d 705, 709 (5th Cir. 1994); ***Graff v. City of Chicago***, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); ***Jews for Jesus, Inc.***

[7] Like the Fourth, Sixth and Ninth Circuits, the Eleventh Circuit has rejected the view that mere access to judicial review is sufficient, but it has not stated what more is required to satisfy the "prompt judicial review" standard. *See* ***Redner v. Dean***, 29 F.3d 1495, 1501-02 (11th Cir. 1994).

v. Massachusetts Bay Transp. Auth., 984 F.2d 1319, 1327 (1st Cir. 1993). In *Graff*, the court concluded that a newsstand ordinance that did not specifically mention judicial review was nonetheless constitutional because access to judicial review was afforded by means of the common law writ of certiorari. *See Graff*, 9 F.3d at 1324-25.

¶ 33 Because we believe that a municipality does not have the authority to direct a state judicial court to issue a decision within a specified period of time, we are inclined to follow the reasoning in *Graff* and the precise language of *FW/PBS* that prompt access or availability of judicial review satisfies First Amendment protections. *See FW/PBS*, 493 U.S. at 227. As the court explained in *TK's Video*, 24 F.3d at 709, "the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A 'brief period' within which all judicial avenues are exhausted would be an oxymoron." While a local governing body can pass an ordinance directing judicial review within a short period of time, we doubt that it can also require a court to make a complete and final judicial review on the merits within a specified time period. We therefore conclude that the City's ordinance will be upheld as long as expeditious judicial review is available.

¶ 34 Here, the licensing scheme satisfies the prompt judicial review standard. MUNICIPAL CODE § 2.11(1) provides that administrative review of a municipality's determination is to be addressed by ch. 68, STATS.:[8]

[8] CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195(11) (1995) also states that state law governs the administrative procedure and judicial review of a license renewal case.

> To insure fair play and due process in the administration of the affairs, ordinances, resolutions and bylaws of the City, the Council hereby declares that the provisions of Ch. 68, Wis. Stats., relating to municipal administrative review procedure shall be in full force and effect in the City. . . .

Under ch. 68, an aggrieved party has thirty days in which to seek review of an initial determination before the municipal authority making the determination. *See* § 68.08, STATS The municipal authority then has fifteen days to conduct its review. *See* § 68.09(3), STATS Once the municipality issues its decision, the person aggrieved may then appeal; the appeal is taken within thirty days of the issuance of the decision. *See* § 68.10(1), (2), STATS The municipality must provide a hearing to the appellant within fifteen days of receipt of the notice of appeal. *See* § 68.11(1), STATS After the hearing is held, the reviewing body has twenty days to make its final determination. *See* § 68.12(1), STATS The appellant may then seek judicial review by certiorari within thirty days of receipt of the final determination. *See* § 68.13, STATS

¶ 35 The ch. 68, STATS, framework for review provides a fixed timetable from the time of the municipal authority's initial determination to the date of the administrative review appeals board's decision. Contrary to City News's assertion, judicial review may not be delayed for an indefinite period of time, as was the case in *Redner v. Dean*, 29 F.3d 1495, 1502 (11th Cir. 1994). There, the licensing scheme was struck down because it stated (1) that an applicant "may" begin operating its establishment "unless and until the County Administrator notifies the

applicant of a denial of the application," and (2) that an appeal will be heard "as soon as the Board's schedule will allow." ***Id.*** at 1500-01. Unlike ***Redner,*** however, ch. 68 does not contain contingencies that leave an applicant at the mercy of the licensor's discretion.

¶ 36 Perhaps more importantly, once the administrative review appeals board has issued its final determination, *See* § 68.12(1), STATS, an appellant may obtain *immediate* judicial review. Review by certiorari must be filed within thirty days of receipt of the final determination. *See* § 68.13(1), STATS We conclude that because the ch. 68, STATS, timetable provides prompt access to judicial review, the dictates of ***FW/PBS*** are satisfied. *See* ***FW/PBS***, 493 U.S. at 227.

5. Public Hearing Provision

¶ 37 City News further argues that an indefinite time period is created as to the public hearing set forth under MUNICIPAL CODE § 8.195(3)(d). This provision states:

> Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.

While § 8.195(3)(d) provides a ten-day period in which a hearing will be held to review the common council's initial determination, there is no language addressing what is to take place following the hearing. And although

the provision concludes that the public hearing shall be held "as hereinafter provided," ***id.,*** there is no further explanation within § 8.195.

¶ 38 The City responds that City News is precluded from raising this argument because it failed to pursue the public hearing and instead sought alternative means of review under ch. 68, STATS This response must fail, however, because City News has brought a facial challenge alleging invalid prior restraints contrary to the First Amendment and such a challenge may be raised regardless of the recourse City News has pursued. *See* ***Brandmiller v. Arreola,*** 199 Wis.2d 528, 546-47, 544 N.W.2d 894, 902 (1996) ("[I]n asserting an overbreadth challenge an individual may hypothesize situations in which a statute or ordinance would unconstitutionally intrude upon First Amendment rights of third parties."). City News, moreover, has standing to contest this provision because

> [i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.

Freedman, 380 U.S. at 56.

¶ 39 We agree with City News that MUNICIPAL CODE § 8.195(3)(d) creates a risk of an indefinite delay by putting an applicant at the mercy of the licensing body. While the applicant may receive a public hearing within ten days, the common council is given no direction as to what it must do following the hearing or when it must

presumably take action in response to the hearing. If a decision is to follow, there are no guidelines providing when such a decision must be issued. Therefore, we conclude, consistent with ***Redner,*** that the public hearing provision within § 8.195(3)(d) is unconstitutionally deficient. *See* ***Redner,*** 29 F.3d at 1502.

¶ 40 We are not convinced, however, that the entire ordinance must fail. A court may sever the unconstitutional portions of a statute or an ordinance to leave intact the remainder of the legislation. *See* ***State v. Janssen,*** 219 Wis.2d 362, 378-79, 580 N.W.2d 260, 267 (1998). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." ***Id.*** at 379, 580 N.W.2d at 267 (quoting ***Regan v. Time, Inc.,*** 468 U.S. 641, 653 (1984)).

¶ 41 As a rule of statutory construction, severability is codified under § 990.001(11), STATS, which states:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

¶ 42 In ***City of Madison v. Nickel,*** 66 Wis.2d 71, 223 N.W.2d 865 (1974), our supreme court saved an obscenity ordinance by severing a portion of it that provided an unconstitutional definition of obscenity. *See* ***id.*** at 80, 223 N.W.2d at 870; *see also* ***State v. Zarnke,*** 224 Wis.2d 116, 135-37, 589 N.W.2d 370, 377-78 (1999). In determining

whether a defective section of an ordinance fatally infects the remainder of the law, a court should look to the legislative intent, particularly whether "the legislature would be presumed to have enacted the valid portion without the invalid [portion]." ***Nickel,*** 66 Wis.2d at 79, 223 N.W.2d at 869 (quoted source omitted). If a statute contains distinct parts and the offending parts can be extracted while leaving intact a "living, complete law capable of being carried into effect . . . the valid portions must stand." ***Id.*** at 79-80, 223 N.W.2d at 870 (quoted source omitted). Additional consideration is given to whether the ordinance contains a severability clause.

¶ 43 Although the ordinance in this case does not contain an express severability clause, the "severability intention" of the common council can be gleaned from the purpose and structure of the ordinance. *See* ***Denver Area Educ. Telecomms. Consortium, Inc. v. Federal Communications Comm'n,*** 518 U.S. 727, 767 (1996) (where the Cable Television Consumer Protection and Competition Act did not contain a severability clause, the Court looked to its purpose and structure to decipher the legislature's intent). The common council has clearly expressed its objective in creating the adult establishment licensing ordinance:

> WHEREAS although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments . . . to combat and curb the secondary effects of such establishments.

MUNICIPAL CODE § 8.195 preamble. While there is no stated purpose regarding the methods of administrative review, we fail to see how severance of the public hearing provision would undermine the overriding goal of regulating adult establishments. *Cf.* ***Katt v. Village of Sturtevant,*** 269 Wis. 638, 642, 70 N.W.2d 188, 190 (1955) (where intention of village board could not be carried out by severing one provision, the whole ordinance was void).

¶ 44 Although MUNICIPAL CODE § 8.195(3)(d) may offer an aggrieved applicant an avenue for administrative review, the primary method of review lies under ch. 68, STATS As the common council has provided under § 8.195(11) ("Administrative Review Procedure"),

> The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, non-renewal, revocation or suspension of a license.

In addition, § 2.11(1) of the MUNICIPAL CODE specifically declares that ch. 68 is controlling for purposes of administrative review. As we have already determined, ch. 68 sets forth narrow, definite and objective standards for bringing an appeal, and City News does not directly challenge this chapter.

¶ 45 Based on the purpose and structure of the ordinance, we are certain that the common council would have still enacted the ordinance even without the public hearing provision. Therefore, because we conclude that severance of the invalid provision leaves intact an otherwise complete licensing scheme, we refuse to strike the entire ordinance.

B. Due Process Considerations

1. Impartial Decision Maker

¶ 46 City News claims that it was deprived of an impartial decision maker when Mayor Carol Opel presided over both the common council's initial determination and the administrative review appeals board's subsequent administrative review.[9] We are not persuaded.

¶ 47 Due process protections, including the right to an impartial decision maker, extend to common council proceedings. *See* ***State ex rel. DeLuca v. Common Council,*** 72 Wis.2d 672, 677, 679, 242 N.W.2d 689, 692, 693 (1976). These protections have been adopted under ch. 68, STATS, which guarantees an appellant the right to a hearing on administrative appeal following the municipality's initial determination. *See* §§ 68.10(1)(a), 68.11(1), STATS[10] Section 68.11(2) states that for purposes of the administrative hearing, the municipality must provide "an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal."

¶ 48 The city mayor is directed to preside over common council meetings. *See* § 62.09(8)(b), STATS In this case,

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[9] The administrative review appeals board is established under CITY OF WAUKESHA, WIS., MUNICIPAL CODE, § 2.11(3) (1995).

[10] An appellant, however, is not granted a hearing on administrative appeal "[i]f the person aggrieved had a hearing substantially in compliance with s. 68.11 when the initial determination was made." Section 68.10(1)(b), STATS

the mayor was present for council meetings addressing City News's license application. The mayor also signed the council's December 19, 1995 resolution denying City News's license application. Later, when the administrative review appeals board conducted its § 68.09, STATS, review, the mayor was one of three individuals who decided to uphold the common council's resolution. City News now argues that because the mayor is the chief executive officer of Waukesha and is entrusted with the power to veto all acts of the common council, see § 62.09(8)(a) and (c), she thereby "participate[d] in making or reviewing the initial determination," § 68.11(2), STATS, by presiding over the council and signing the December 19 resolution. City News claims that by approving the resolution and, in turn, choosing not to exercise her veto power, the mayor disqualified herself as an "impartial decision maker."

¶ 49 ***DeLuca*** is instructive on this issue. There, the court explained that due process protections extend both to the bias and the appearance of bias of the decision maker. "Circumstances which lead to a high probability of bias, even though no actual bias is revealed in the record, may be sufficient to give the proceedings an unacceptable constitutional taint." ***DeLuca,*** 72 Wis.2d at 684, 242 N.W.2d at 695. Following ***Withrow v. Larkin,*** 421 U.S. 35 (1975), the court recognized two circumstances that show "such a high probability of actual bias as to be constitutionally intolerable." ***DeLuca,*** 72 Wis.2d at 684, 242 N.W.2d at 695. The first situation presents itself when the decision maker has a financial interest at stake; the second occurs when the adjudicator has been subject to

"personal abuse or criticism" from the party before it. *See id.*

¶ 50 In the present case, there is no indication that the mayor was influenced by impending financial interests in the outcome of the proceedings or had been the target of any personal abuse from City News. In addition, during the administrative review hearings, the mayor stated that

> I, too[,] believe that I can be an impartial hearer of this testimony. While I have chaired all the common council meetings, I act as a facilitator. I have not offered testimony or debate or spoke to the issue before the council at any time.

These statements support the conclusion that the mayor did not play a role in the decision-making process, and City News has not presented any evidence suggesting that the mayor did more than facilitate the common council's meetings. We agree with the City that under the circumstances the mayor's signature was a purely administrative act and was not indicative of her position on the merits of the dispute. Although the mayor had the power to veto the council's resolution, this discretion did not constitute review of the resolution. Therefore, because we are persuaded that the mayor did not participate in making or reviewing the resolution, we conclude that she was not disqualified from her subsequent participation in the administrative review proceedings.

2. *Adequate Notice*

¶ 51 City News next raises several arguments alleging a lack of sufficient notice as to the charges against it.

As it points out, it has a property interest in the renewal of its operating license. *See* ***Manos v. City of Green Bay,*** 372 F.Supp. 40, 48-49 (E.D. Wis. 1974) (property interest was found for retention of liquor license). Such a property interest warrants the minimal safeguards of procedural due process. *See* ***id.*** at 49. These basic guarantees include providing notice of the charges upon which the license denial was based and giving an opportunity to challenge the charges. *See* ***id.*** at 51.

¶ 52 City News claims that following the issuance of the City's resolution, the City exceeded the scope of the allegations contained therein when it presented testimony from T.M., and related exhibits, at the administrative review hearing.[11] We are not persuaded.

¶ 53 T.M. testified that he was seventeen years old when he entered City News on March 7, 1996, and stole adult magazines. At the administrative hearing, City News objected to T.M.'s testimony because it had not received notice that the City was going to call T.M. and his actions were not mentioned in the December 19, 1995 resolution because the March 7 incident occurred after the common council had issued the resolution. The City responded that T.M.'s testimony was offered to impeach

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[11] City News also complains that testimony about Jamie Bahr, including Exhibits 36 and 37, should not have been presented because this evidence went beyond the scope of the December 19 resolution. While we understand that the evidence about Bahr concerns a citation for displaying sexual material to minors, City News does not explain, and we cannot readily determine, the substance of the testimony. We therefore decline to address the issue. *See* ***State v. Pettit,*** 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

the prior testimony of City News employee David Hull concerning City News's personal identification policy and the fact that Hull had been issued a citation for permitting a minor to loiter on its premises. The administrative review appeals board noted City News's objection but nonetheless permitted T.M. to testify.[12]

¶ 54 We agree with the City. T.M.'s testimony was not used as a new ground for rejecting City News's license application. Rather, it was brought for the purpose of impeaching Hull's testimony that he abided by the store's policy of checking the identification of every person who appeared younger than thirty years of age. City News admitted as much in its proposed findings of fact for the administrative review appeals board where it stated, "[W]e find that [T.M.'s] testimony is not credible and is not sufficient to rebut the testimony of David Hull, the purpose for which it was offered." The administrative review appeals board's findings are also telling. There, the board relies upon the testimony of police officers who observed minors loitering on City News's premises and patrons engaging in sexual activity, and upon a building inspector's report regarding the size of the viewing booths. There is no mention, however, of T.M. We conclude, therefore, that the admission of T.M.'s testimony did not implicate due process protections.

¶ 55 Next, City News complains that it was denied adequate notice of a November 7, 1995 open booth violation that was raised at the administrative review hearing

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[12] The administrative review appeals board explained that it was its policy to note all objections but to nonetheless receive the evidence and determine its weight upon deliberation.

but not cited in the December 19 resolution. The resolution cited three open booth violations for which City News's operator received ordinance citations and was subsequently convicted. The resolution states:

> WHEREAS, on 11/30/94, 12/1/94 and 12/2/94 City News and Novelty, Inc. through its employees and/or agents violated the provisions of section 8.195(9)(b)2 of the Waukesha Municipal Code by failing to have every booth, room or cubicle totally open to a public lighted aisle so [as to] permit[ ] an unobstructed view at all times of anyone occupying the same.

During the administrative review, however, city building inspector Marvis Lemke reported that while City News's booths had violated the open booth ordinance upon his annual inspection on November 7, by November 30 the booth entrances had been reopened to an acceptable level. In the administrative review appeals board's findings, the board included Lemke's November 7 inspection report and mentioned the three ordinance violations. City News now claims that it had no notice of the November 7 open booth violation.

¶ 56 City News was provided sufficient notice to defend against the November 7 booth violation. First, MUNICIPAL CODE § 8.195(7)(d) advises that "[t]he building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance." City News therefore had notice that an inspection would be made before its license would be renewed. Second, City News does not deny that it received citations for and was convicted of open booth violations occurring on November 30 and December 1

and 2, 1994. The December 19 resolution cited these violations. Third, the basis of all of the open booth violations was the same – City News's use of wood paneling to narrow the booth openings, thereby creating an obstructed view of the booths.

3. *Sanctions Imposed*

¶ 57 City News next raises the issue of whether the City's response to its alleged violations of the ordinance, which was to invoke the most severe form of sanction and deny renewal of the license, passes constitutional muster. City News claims that the City acted unreasonably in "saving up" all of its complaints past the point where City News could effectively remedy them prior to renewal. City News argues that by utilizing a "sub rosa theory of strict liability without ever articulating it as such," the City has offended procedural due process requirements.

¶ 58 The City responds that the issue of whether it may deny a license renewal application rather than issue a license suspension or revocation is solely a matter of discretion for the licensing body. It asserts that there is no licensing requirement that it first provide a warning, a suspension or some lesser penalty before nonrenewal is appropriate. It adds that City News has failed to cite any authority addressing the issue of the appropriateness of particular sanctions sought by a municipality based upon ordinance violations.

¶ 59 We agree with the City that there is no authority requiring a municipality to pursue a lesser sanction or the

least restrictive sanction in the event of an ordinance violation. There are, however, particular procedural due process considerations at play. These include providing notice of the charges, an opportunity to respond to and challenge the charges, an opportunity to present witnesses, and an opportunity to confront and cross-examine opposing witnesses. *See* ***Manos,*** 372 F.Supp. at 51. In this case, we have already determined that City News was provided adequate notice of the charges. In addition, there is no dispute that it was afforded an opportunity to challenge the charges.

¶ 60 We next consider the particular types of sanctions available when an operator violates the ordinance. First, there is nonissuance and nonrenewal of a license. This measure is conditioned upon an applicant having violated a provision of the licensing scheme within five years of the application. Second, revocation of a license for one year is similarly available where "[t]he operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section." MUNICIPAL CODE § 8.195(8)(a)2. Finally, a suspension of thirty days or less may be invoked "in the case of a first offense by an operator where the conduct was solely that of an employee . . . if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge." ***Id.***

¶ 61 Suspension is inappropriate here because the board specifically found that a director of City News had committed various violations of the ordinance. According

to the board's June 28, 1996 findings, Police Officer Richard Piagentini observed a minor patron on City News's premises on December 24, 1994, and City News director Daniel Bishop was subsequently convicted for permitting the minor on the premises contrary to MUNICIPAL CODE § 8.195(10)(c). The findings indicate that Bishop also received convictions for three other ordinance violations based on City News's failure to maintain open viewing booths pursuant to § 8.195(9)(b)2. Therefore, because a director of City News was found to have contravened the ordinance, we attribute knowledge of the violations to City News. We further note that the violations cited by the board were not solely at the hands of an employee. Thus, suspension is not an available sanction in this case.

¶ 62 While revocation and nonrenewal both rely upon a violation of the ordinance, we believe the City properly exercised its discretion in deciding to impose a nonrenewal sanction. In its findings, the board listed nine separate ordinance violations occurring within a one-year period. Four of these involved minors loitering on the premises, three involved open booth violations and two dealt with customers masturbating in viewing booths. In its preamble, the ordinance speaks to particular health and safety concerns endemic to adult-oriented establishments. Such concerns include the transmission of AIDS and other sexually transmitted diseases and increased levels of criminal activity such as prostitution, rape and assaults. Considering both the health and safety issues as well as City News's record of ordinance violations, we are satisfied that the City acted within its discretion.

C. Sufficiency of Nonrenewal Grounds

¶ 63 Finally, City News asserts that the grounds upon which the nonrenewal determination was based were inadequate as a matter of law. It claims that citations issued to patrons in February and March 1995 for lewd and lascivious conduct cannot stand as a basis for nonrenewal.[13] City News further argues that because the standards for issuance of a new license concern only the conduct of officers, directors and stockholders of the corporation,[14] the conduct of patrons is immaterial. City News is wrong.

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[13] The administrative review appeals board's findings were, in pertinent part, as follows:

> 1. On February 28, 1995, Officer John Gibbs observed a patron of City News and Novelty, Inc. . . . masturbating in a viewing booth. . . . There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. . . .
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> 2. On March 11, 1995, Officer Paul De Jarlais observed a patron at City News . . . masturbating in a viewing booth. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. . . .

[14] MUNICIPAL CODE § 8.195(4)(b)2 provides, "No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application."

¶ 64 As we have previously outlined, the ordinance contains specific restrictions under subsecs. (9) and (10) that stand apart from the general licensure standards under MUNICIPAL CODE § 8.195(4)(b). One such requirement is that no occupants of booths, rooms or cubicles shall engage in any type of sexual activity. *See id.* § 8.195(9)(c). At the end of the licensing scheme, the ordinance states generally that "[t]he operator shall insure compliance of the establishment and its *patrons* with the provisions of this section." *Id.* 8.195(10)(f) (emphasis added). "Operator" is defined as any "person, partnership, or corporation operating, conducting, maintaining or owning any adult-oriented establishment." *Id.* § 8.195(1).

¶ 65 It is clear from the ordinance that City News is the operator here and that when patrons were issued citations for and convicted of lewd and lascivious behavior, City News violated the ordinance by not ensuring compliance with the para. (9)(c) prohibition on sexual activity. A plain reading of the ordinance does not limit the City's review to only the conduct of officers, directors and stockholders. If it did, then the conduct of employees, including permitting the exposure of sexual material to minors, would be of no consequence. City News's position, therefore, contravenes the explicit condition that actions of "any employee constituting a violation of the provisions of this section" are imputed to the operator for purposes of determining revocation, suspension or renewal. *See id.* § 8.195(10)(b). We reject this narrow reading of the ordinance.

¶ 66 City News next asserts that the testimony of police officers that minors had been found loitering in the

store on three separate occasions[15] was insufficient evidence as a matter of law to qualify as a "finding," as this concept is used within the licensing ordinance. *See id.*

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[15] The administrative review appeals board's findings stated the following:

> 2. On July 23, 1995, Officer John Konkol observed S.S., a patron, at City News . . . who was a minor. Officer Konkol made the observation while on duty. Additionally, S.S. testified that she was a patron at City News . . . on July 23, 1995 and . . . was a minor. Christopher Alverson, the employee on duty at the time, was convicted of a civil ordinance violation contrary to Section 8.195, Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 25, 1995. There was no evidence to refute the credible testimony of Officer Konkol or S.S.
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> 3. On October 18, 1995, Officer Mark Howard observed S.D., a patron, at City News . . . who was a minor. Officer Howard made the observation during the course of a routine investigation. Additionally, S.D. testified that he was a patron of City News . . . on October 18, 1995 and . . . was a minor. There was no evidence to refute the credible testimony of Officer Howard and S.D.
>
> 4. On November 29, 1995, Officer Paul Paikowski observed a patron of City News . . . who was a minor. Officer Paikowski made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News. . . . There was no evidence to refute the credible testimony of Officer Paikowski.

Because the July 23 incident led to a conviction, City News is wrong in stating that it "has never been convicted, even in municipal court, of these violations." City News is otherwise correct that the October 18 and November 29 incidents did not result in convictions.

§ 8.195(4)(b)2 ("[N]o officer, director, or stockholder . . . shall have been *found* to have previously violated this section. . . . "). (Emphasis added.) In reviewing the board's findings, we apply the substantial evidence test to determine whether the evidence is sufficient. *See* ***Clark v. Waupaca County Bd. of Adjustment,*** 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994). Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. *See id.* The substantial evidence test is highly deferential and we may not substitute our view of the evidence for that of the board. *See id.*

¶ 67 We conclude that substantial evidence supported the board's findings. At the administrative hearings, a police officer testified to each of the three incidents involving minors. Each observation made by the officers took place while the officer was on duty. For two of these incidents, the minor involved testified to his or her conduct. This evidence was substantial and City News has failed to present any evidence to refute the testimony of the officers or the minor patrons.

¶ 68 Finally, City News seeks to refute evidence of a fourth incident involving a minor loitering on its premises. At the administrative hearings, an officer testified that while on patrol he observed a minor at City News on December 24, 1994. The board's findings indicate that an employee and a director of City News were convicted of civil ordinance violations for this incident. City News now contends that because these convictions were later dismissed on appeal and because a conviction must stand to qualify as a finding of the board, this incident carries

no weight in support of the board's decision. We disagree.

¶ 69 First, City News provides no authority to support its view that only a conviction can constitute a finding of the board. Contrary to this position, the board has the discretion to make its own findings of fact based on the evidence presented. As was the case with the July 23, October 18 and November 29, 1995 incidents involving minors, an officer testified that he observed a minor patron on City News's premises. This evidence was not refuted by City News, and while the convictions of the employee and director were dismissed, the board was still justified in relying on the evidence presented at the hearings. Because we conclude that the board's findings are supported by a reasonable view of the evidence, *see* ***Snyder v. Waukesha County Zoning Bd. of Adjustment,*** 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976), City News's argument is without merit.

CONCLUSION

¶ 70 While City News's due process and sufficiency of the evidence challenges fail, we agree that the public hearing provision under § 8.195(3)(d) of the MUNICIPAL CODE is constitutionally deficient. However, rather than striking the entire ordinance, we conclude that § 8.195(3)(d) is severable and thus reverse as to this provision and affirm as to the remainder.

Costs are denied to both parties.

By the Court. – Judgment affirmed in part and reversed in part.

Recommended for publication in the official reports.

No. 97-1504

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

CITY NEWS & NOVELTY, INC.,	**FILED**
PLAINTIFF-APPELLANT,	**Mar 18, 1998**
v.	**Marilyn L. Graves Clerk of Supreme Court**
CITY OF WAUKESHA,	**Madison, WI**
DEFENDANT-RESPONDENT.	

CERTIFICATION BY COURT OF APPEALS OF WISCONSIN

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to RULE 809.61, STATS., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.[1]

ISSUES

1. Is an "adult-oriented establishments" municipal ordinance that fails to preserve the status quo during the administrative license renewal process facially unconstitutional?

[1] The parties raise and argue additional issues in the briefs; however, we certify only the following three issues for supreme court review.

2. Is the ordinance unconstitutional if it fails to provide express time limits for judicial review?

3. Can a municipality enforce the ultimate ordinance sanction (license denial) without affording the license holder timely opportunity to remedy alleged violations?

STATEMENT OF FACTS

City News and Novelty, Inc. is an adult-oriented establishment in the City of Waukesha. It is licensed annually under the provisions of § 8.195 of the CITY OF WAUKESHA, WIS., MUNICIPAL CODE (1995). On November 15, 1995, City News applied for renewal of its license; its license was due to expire on January 25, 1996.[2] The code provides that "[w]ithin twenty-one (21) days of receiving an application for a license the City Clerk shall notify the applicant whether the application is granted or denied." *Id.* at § 8.195(3)(c).

On December 19, 1995, the common council passed a resolution that found City News had committed several violations of the ordinance and as a result denied the renewal of its license. City News requested administrative review of this decision; after holding administrative hearings and receiving briefs, the Waukesha Administrative Review Board affirmed the City's decision on June 28, 1996. City News then filed a certiorari action in circuit court and sought judicial review of the denial of its

[2] The ordinance requires that a renewal application must be filed "not later than sixty (60) days before the license expires." CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195(7)(a) (1995).

license renewal. The circuit court affirmed the decision of the Board in a decision filed April 2, 1997.

DISCUSSION

Preserving the Status Quo

The first issue certified is whether the ordinance is unconstitutional because it fails to explicitly preserve the status quo throughout the administrative process. According to the Supreme Court in ***FW/PBS, Inc. v. City of Dallas,*** 493 U.S. 215 (1990), a licensing scheme that exists as a prior restraint on businesses that purvey sexually explicit but protected speech is constitutionally permissible if it contains safeguards to minimize the possibility that the licensing procedure will be used to suppress speech. *See* ***id.*** at 226. The Court then set out several requirements which licensing ordinances must include in order to pass constitutional scrutiny.

First, the regulatory scheme cannot place " 'unbridled discretion in the hands of a government official or agency.' " ***Id.*** at 225 (quoting ***City of Lakewood v. Plain Dealer Publ'g Co.,*** 486 U.S. 750, 757 (1988)). In other words, if a permit or license may be granted or withheld solely at the discretion of a government official, this is an "unconstitutional censorship or prior restraint" upon the exercise of the freedom of speech. *See* ***id.*** at 226. Second, it is impermissible for a prior restraint to not place limits on the time within which the decision maker must issue or deny a license. *See* ***id.*** The Court held that a licensing decision must be made "within a specific and reasonable time period during which the status quo is maintained." ***Id.*** at 228. Finally, a regulatory scheme must

provide for "prompt judicial review" in the event that a license is erroneously denied. *See* ***id.***

In ***Wolff v. City of Monticello,*** 803 F. Supp. 1568, 1574 (D. Minn. 1992), a federal district court applying ***FW/PBS*** referenced the above-quoted statement and went on to conclude that because the ordinance under scrutiny in that case did not include a *specific provision* which assured that the status quo would be maintained, it was unconstitutional under ***FW/PBS***. *See* ***Wolff,*** 803 F. Supp. at 1574. The ***Wolff*** court concluded that because the ordinance did not preserve the status quo "on its face," the city's promise that it would take no action to enforce the ordinance prior to a final decision on the license application did not comply with ***FW/PBS***. *See* ***Wolff,*** 803 F. Supp. at 1575.

The City does not dispute the general requirements of ***FW/PBS***. However, the City contends that because its ordinance provides that a decision to grant or deny the application for a license must be made within twenty-one days, the above requirements are met. Because a license renewal is required to be filed sixty days before the expiration of the current license, the City argues that the status quo is automatically maintained because by adhering to the statutory time line outlined by the statute, "the ability to continuously operate the adult oriented establishment is not interrupted. . . . The status quo is preserved because the 21 day period runs prior to the expiration of a license."[3]

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[3] We note that thirty-four days passed between City News' filing for renewal on November 15 and the common council's resolution which denied the renewal on December 19.

There is no Wisconsin law on this issue. There is also no Supreme Court statement on whether the absence of an explicit status quo provision renders an ordinance facially unconstitutional under ***FW/PBS***. Because this issue will greatly impact local municipalities' regulation of adult-oriented establishments, we respectfully request that the state's highest court decide this issue.

Prompt Judicial Review

Related to the first issue is the question of whether the City's ordinance is unconstitutional because it fails to provide express time limits for judicial review. The City cites to ***Chesapeake B & M, Inc. v. Harford County, Md.***, 831 F. Supp. 1241 (D. Md. 1993), in support of its position that *access to* judicial review is all that is required. However, the district court's holding that "a licensing ordinance need only provide for the availability of prompt judicial review," *see id.* at 1250, was reversed on appeal.

On review the Fourth Circuit stated that "[f]or the reasons announced today in our en banc opinion in ***11126 Baltimore Blvd., [Inc. v. Prince George's County, Md.***, 58 F.3d 988 (4th Cir. 1995)], we agree that prompt judicial review means *a sufficiently prompt decision on the merits.*" ***Chesapeake B & M, Inc. v. Harford County, Md.***, 58 F.3d 1005, 1012 (4th Cir. 1995) (emphasis added). As explained in ***11126 Baltimore Boulevard***, other cases prior to ***FW/PBS***, including the seminal case of ***Freedman v. Maryland***, 380 U.S. 51 (1965), had used the term "prompt judicial review" to mean a *prompt judicial determination*. *See* ***11126 Baltimore Blvd.***, 58 F.3d at 999-1000. Coupling that history with the Court's decision in ***FW/PBS***, the

court concluded that the decision in ***FW/PBS*** must be read as maintaining the ***Freedman*** requirement of a prompt judicial determination of the issue.[4] *See* ***11126 Baltimore Blvd.***, 58 F.3d at 1000.

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[4] *See, e.g.*, ***Freedman v. Maryland***, 380 U.S. 51, 59 (1965) ("[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"); ***Southeastern Promotions, Ltd v. Conrad***, 420 U.S. 546, 561-62 (1975) (judicial decision on the merits which was not obtained for five months did not comport with "prompt judicial review"); ***United States v. Thirty-Seven Photographs***, 402 U.S. 363, 372 (1971) (using "prompt judicial review" as synonymous with "prompt judicial determination"); ***Blount v. Rizzi***, 400 U.S. 410, 417 (1971) (stating that the ***Freedman*** Court held that a scheme of administrative censorship must require prompt judicial review, defined as "a final judicial determination on the merits within a specified, brief period" in order to avoid constitutional infirmity).

However, in cases subsequent to ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215 (1990), the federal appellate courts are split. *See, e.g.*, ***TK's Video, Inc. v. Denton County, Tex.***, 24 F.3d 705, 709 (5th Cir. 1994), and ***Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth***, 984 F.2d 1319, 1327 (1st Cir. 1993) (both cases hold that the requirement of "prompt judicial review" is satisfied by providing access to the courts after an administrative denial). *But see* ***East Brooks Books, Inc. v. City of Memphis***, 48 F.3d 220, 224-25 (6th Cir. 1995) (unequivocally rejecting the argument that mere access to judicial review satisfies the prompt judicial review requirement). It should be noted that in neither the ***TK's Video*** nor ***Jews for Jesus*** decision did the court attempt to analyze how the conclusion it reached was consistent with Supreme Court precedent in this area. *See* ***11126 Baltimore Blvd., Inc. v. Prince George's County, Md.***, 58 F.3d 988, 1000 n. 17 (4th Cir. 1995).

In the instant case, the ordinance is silent as to any provision which addresses the timeliness of judicial review of the administrative review process. The City claims that prompt judicial review of a board's determination is provided by § 68.13, STATS., and that under ***FW/PBS***, this is all that is required. However, as discussed above, this analysis does not square with a significant body of case law preceding ***FW/PBS***. On the other hand, if a prompt judicial *determination* is required in order to comply with ***FW/PBS***, how can a local governing body pass an ordinance containing directives or requirements that the circuit courts of the state answer issues of this type within a specified time period? None of the cases calling for a prompt judicial determination have squarely addressed this issue, although ***11126 Baltimore Boulevard*** suggests that if a licensee is permitted to operate until a judicial determination is rendered, the constitutional problem could be avoided. *See* ***11126 Baltimore Blvd.***, 58 F.3d at 1001 n. 18.

Sanctions Imposed

The third issue is whether the City's response to alleged violations of the ordinance, which was to invoke the most severe form of sanction and deny renewal of the license, passes constitutional muster. City News claims that the City acted unreasonably in "saving up" all of its complaints past the point where City News could effectively remedy them prior to renewal. By utilizing a "sub rosa theory of strict liability without ever articulating it as such," City News claims that the City has offended procedural due process requirements. While the ordinance provides for a maximum suspension of thirty days

if a violation occurs without the actual or constructive knowledge of the operator of the establishment, *see* MUNICIPAL CODE, § 8.195(8)(a)2, in this case the City compiled a number of violations, including citations given to patrons of the store, and utilized these violations as the basis for not renewing City News' license to operate.

According to the Supreme Court, content-based restrictions on speech "must be subjected to the most exacting scrutiny." ***Boos v. Barry,*** 485 U.S. 312, 321 (1988). Although time, place or manner restrictions have never been subject to the same "strict scrutiny," if a regulation is content-based it is subject to a least-restrictive-alternative analysis. *See* ***Ward v. Rock Against Racism,*** 491 U.S. 781, 798 n.6 (1989). Such a regulation must be "narrowly tailored" and a less-restrictive alternative cannot be readily available. *See* ***Boos,*** 485 U.S. at 329.

At issue in the instant case is whether the ordinance is constitutionally infirm because it allows the drastic sanction of nonrenewal to be invoked without first implementing the lesser penalty of suspension. City News claims that because the ordinance operates as a prior restraint, it is subject to the least-restrictive-alternative requirement. *See* ***Ward,*** 491 U.S. at 798-99 & n.6. In response, the City asserts that "[t]here is no requirement in the ordinance, nor need there be a requirement that the appellant should first be subject to a warning, a suspension or some other lesser penalty before nonrenewal is appropriate. *This is a matter totally within the discretion of the licensing authority.*" (Emphasis added.)

In several federal cases the least-restrictive-means analysis has been used to invalidate portions of prior

restraint ordinances. *See Genusa v. City of Peoria*, 619 F.2d 1203, 1219 (7th Cir. 1980) (stating that the city is required to "demonstrate the existence of a substantial and legitimate state interest that is unrelated to the suppression of free expression and that cannot be effectuated by means that impact less drastically on protection freedoms"); ***Suburban Video, Inc. v. City of Delafield***, 694 F. Supp. 585, 592 (E.D. Wis. 1988) (disclosure requirements that invade plaintiffs' privacy without any legitimate justification are prohibited by the First and Fourteenth Amendments). City News claims that under a least-restrictive-means analysis, the City's nonrenewal of its license to operate without affording it an opportunity to remediate any violations did not afford City News procedural due process and this failure calls into question the constitutionality of the ordinance.

Because these issues impact the ability of municipalities to fairly license and regulate the operation of adult-oriented businesses and because there is an absence of precedent-setting state or federal law in this area of constitutionally sensitive expression, we respectfully request the Wisconsin Supreme Court to accept jurisdiction.

[Seal]

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April 21, 1998

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You are hereby notified that the Court has entered the following order:

No. 97-1504 *City News & Novelty, Inc. v. City of Waukesha*
L.C.#96CV1427

The appeal in this case having been certified from the court of appeals to this court pursuant to Wis. Stat. § 808.05(2);

IT IS ORDERED the certification is refused.

Shirley S. Abrahamson, C.J., concurs but would have the court state its reasons for refusing certification.

Marilyn L. Graves
Clerk of Supreme Court

[Seal]

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January 18, 2000

To:

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You are hereby notified that the Court has entered the following order:

No. 97-1504 *City News & Novelty, Inc. v. City of Waukesha* L.C.#96CV1427

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, City News & Novelty, Inc., and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN
CIRCUIT COURT BR. 11
WAUKESHA COUNTY

CITY NEWS & NOVELTY, INC.,

Plaintiff,

-vs-

CITY OF WAUKESHA,

Defendant.

CASE NO. 96-CV-1427

DECISION

(Filed Apr. 2, 1997)

Plaintiff, City News & Novelty, seeks certiorari review of defendants', City of Waukesha and City of Waukesha Administrative Review Board, decisions not to renew their license to operate an adult oriented establishment at 245 West Main Street in the city of Waukesha. Plaintiff contends that the action of the defendant in failing to renew plaintiff's license was unlawful because the licensing ordinance is unconstitutional and represents unconstitutional restraint; plaintiff contends that it was denied due process with respect to notice and an impartial tribunal; further the plaintiff contends that the record is inadequate as a matter of law to support the findings of the Administrative Review Board.

Review on certiorari is limited to whether, (1) the board kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the

order or determination in question. *Coleman v. Percy*, 96 Wis. 2d 58, 588 (1990). On review courts should be "hesitant to interfere with the administrative determinations and accord the decision of the board [of appeals] a presumption of correctness and validity." *Snyder v. Waukesha Zoning Board*, 74 Wis. 2d 468, 476 (1976). Further on certiorari this court may not disturb the Board's findings if they are sustained by any reasonable view of the evidence nor substitute its discretion for that of the Board.

Plaintiff contends that the Waukesha Licensing Ordinance Section 8.195 under which the City Administrative Review Board acted is facially unconstitutional. Ordinarily, certiorari is confined to a review of the decisions of an administrative agency. Common councils and boards of review are not empowered to declare legislation unconstitutional. Such bodies can determine whether constitutional elements of due process have been accorded applicants. *Kmiec v. Town of Spider Lake* 60 Wis. 2d 640, 645 (1973). Some cases hold that declaratory judgment is the vehicle for a test of constitutionality. The court after research concludes that the case of *Omernick v. Department of Natural Resources*, 100 Wis. 2d 234 (1981) sets the procedural policy for Wisconsin:

> We believe *Cobb* reflects a fundamental policy that parties to an administrative proceeding must raise known issues and objections and that all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record under Section 227.20 Stats. That policy, applicable in this case as it was in *Cobb*, requires that those constitutional issues be raised even

> though the administrative agency is without power to decide them. p. 248.

Plaintiff did not specifically address the constitutional issues in the hearings before the Administrative Review Board; however in January of 1996, in a "request for a review" of the determination of the Common Council, the specific constitutional infirmities of 8.195 alleged by the plaintiff were listed. In a footnote, the plaintiff noted that it was reserving the "right to raise issues pertaining to the constitutionality of Section 8.195 in state or federal court in an appropriate action at an appropriate time." The brief supporting the request concludes with a paragraph that contains the following language: "In particular, the omission of any constitutional arguments is not intended as a waiver of said arguments because the applicant understands that the Council does not have jurisdiction to declare any portion of the City's ordinances unconstitutional. The applicant intends to raise the constitutional issues in a appropriate forum." From this record, the court concludes that the plaintiff has raised specifically the constitutional issues and under the *Omernick* case the court has jurisdiction to decide them. Contrary to defendant counsel's belief, plaintiff is not attacking Wisconsin Statute Chapter 68.

The first issue concerns the plaintiff's assertion that no explicit standards for renewal of licenses are contained in the defendant's ordinance. The plaintiff contends that the Board was acting against the law in utilizing the standards for granting of a new license under Section 8.195 (4). Plaintiff argues the holdings in these cases support their position: *Renton v. Play Time*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 19, (1986); *City of Lakewood*

v. Plain Dealer Publishing Company, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed. 771, (1988); and *Wolff v. City of Monticello*, 803 F.Sup. 1568 (Minnesota, 1992).

Defendant argues that plaintiff's counsel conceded the propriety of utilizing the standards under 8.195 (4) because plaintiff's counsel submitted findings of fact and conclusions of law to the administrative review board adopting same as the standards for renewal. The court does not find this argument of the defendant to be persuasive.

Defendant next observes that the language of 8.195 was analyzed in *Suburban Video v. City of Delafield*, 64 F.Sup. 585, (E.D. Wis., 1988). The Delafield ordinance has the same language with respect to "renewal" and other strictures as the Waukesha ordinance. This court finds that the constitutionality is not only presumed but confirmed by precedent. Defendant further argues that a reading of the entire ordinance reveals that the granting of new licenses, suspensions, revocations and renewals is dictated by the same standards: i.e., the presence or absence of violations of the sections of the ordinance. In a reply brief, plaintiff notes the denotations of "issue" and "renew" are quite separate. The court finds that in Section 8.195(4) the word "issuance" (a nominalization) only appears in the heading. The headings (STANDARDS FOR ISSUANCE OF LICENSE, FEES, RENEWAL OF LICENSE OR PERMIT, REVOCATION OF LICENSE) and the numerical enumeration are matters of style and indexing. The headings and enumerations are not operative parts of the legislation. When Section 8.195(4) is read in conjunction with 8.195(10) (b) the language demonstrates that the standards for obtaining a license apply.

The *City of Lakewood* case is distinguishable because the ordinance in question contained no standards. *Wolff* is also inapplicable because the format and language of the ordinance in that case was quite different from the Waukesha city ordinance. Therefore the court concludes that the ordinance is explicitly with respect to the standards to be applied when an applicant seeks renewal and the Administrative Review Board did not act unlawfully.

Plaintiff next asserts that the language of the ordinance permits unbridled discretion because Section 8.195(4) (d) (2) is vague. The plaintiff argues that the words "shall have been found" is not defined and is open to subjective decision making. The plaintiff contends that the language can't survive a vagueness challenge. The concern here is heightened because of the ordinance requirement to renew annually. *City of Lakewood, supra*, 760. The court finds that Judge Evans reviewed the same language with approval in *Suburban Video v. The City of Delafield*; also the plaintiff has cited no case stating that use of the word "found" is improper. The court notes that the forms of the verb "to find" are part and parcel of legal procedure. "To find" is to make a determination of fact; it's the act of an adjudicator after investigation or hearing. The cases cited by plaintiff all concern criminal statutes and involve whether the prohibited conduct is stated clear enough. *State v. Courtney*, 74 Wis. 2d 705, (1976); *State v. Tronca*, 84 Wis. 2d 88, (1977); *State v. Pompanz*, 112 Wis. 2d 166, (1983).

Plaintiff does not attack the nature of the conduct which "if found" constitute a violation of the ordinance. This court finds that the past perfect subjunctive "shall have been found to have violated" sets limits on the

municipal body rather than granting unbridled discretion. The Common council can only act when facts or evidence of a violation exist. The action is then subject to review under the substantial evidence test. The language is not vague.

The next two constitutional challenges can be combined: the challenges in regard to time limits; and for failure to preserve the status quo throughout the review process. The court agrees with the plaintiff that the review in this area must be confined to the statutory language and not the chronology of plaintiff's own renewal process. Because an applicant may choose to waive a time limit or because the Council did not upset the status quo are not relevant.

The importance of time limits is clear:

> The core policy underlying *Freedman* is that the license for a first amendment protected business must be issued within a reasonable period of time, because undo [sic] delay results in the unconstitutionality suppression of protected speech. *FW/PBS, Inc., v. Dallas*, 493 U.S. 215, 224, 110 S.Ct., 603.

The court does not find that 8.195(7) (c) – filing by police department, and (7) (d) – inspection by the building inspector create the capability to delay the decision on the grant or denial of a license. The sections do not change the 21-day time period after receiving an application for a license. In *FW/PBS v. Dallas*, the license was conditioned on an inspection by "health and fire departments and building officials" for compliance with other ordinances. No time limit was set for the inspections. In

the case at hand, the grant or denial is not conditioned on inspection and compliance.

Plaintiff next argues that, consistent with *Redner v. Dean*, 29 F. 3d, 1495, (11th Cir. 1994), the ordinance is defective because there is no time limit on the Common Council to decide after the public hearing specified in 8.195(3) (d).

> (d) Whenever an application is denied, the city clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within ten days of receipt of notice of denial, a public hearing shall be held within ten days thereafter before the council or its designated committee as here in after provided.

This subsection must be read, with respect to procedures and time limits, in conjunction with Section 2.11 which adopts Chapter 68 of the Wisconsin Statutes.

> 8.195(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State Law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

The ordinance and the statute establish a licensing scheme which does not allow "unbridled discretion in the hands of government official or agency."

Reference to the provisions of Chapter 68 negates the arguments of the plaintiff. The city clerk notifies the applicant in writing whether the application is granted or denied, 8.195 (3). This is a determination according to 68.01. At this point, the applicant can ask for a public hearing which must be held within ten days. 8.195 (3);

and/or the applicant may proceed under 68.08, a request for review. The review has time limit of 15 days pursuant to 68.09. The applicant has other options under 68.10 which has time limits for review and decision. (68.11 and 68.12).

In the same case at hand plaintiff chose to file a request under 68.08 immediately after the Common Council made the initial determination to deny the license renewal. The applicant does not bear any burden; the applicant merely chooses which facet of review to pursue and the City must follow the prescribed time limits. The court finds this licensing scheme comports with the holding in *FW/PBS, Inc., v. Dallas*; there is not part of the licensing scheme that allows indefinite postponement of the issuance or renewal of the license.

Plaintiff raises the question of preserving the status quo. None of the cases cited deal with status quo for renewals. The city did not address this issue in their brief. Again the fact that the Council did not halt the plaintiff's operation during the renewal and review process is not dispositive of the challenge.

Time limits and status quo go hand in hand. The most instructive case is *T.K.'s Video, Inc., v. Denton County Texas*, 24 F. 3d 705 (5th Circuit 1994):

> Nor is this unduly restrictive, given the availability of expeditious judicial review. A rejected license applicant has 30 days to seek judicial relief before the order of the director of public works becomes final.
>
> This does not answer the further question of how much of the total licensing process must be

> complete within the specified brief period, specifically whether the brief period includes completion of judicial review. Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.*, and some uncertainty in the language of Justice O'Connor's opinion in the same case we read the supreme court to insist that the state must offer a fair opportunity to complete the administrative process an access to the courts within a brief period. A brief period within which all judicial's avenues are exhausted would be an oxymoron.
>
> *T.K.* objects that the order does not provide automatic and prompt judicial review or an automatic stay of an order denying a license. As we explained the order provides that filing a notice of appeal to the state district court of Denton County stays an administrative decision revoking or suspending a license so the focus of T.K.s intentions is on the absence of stay of an order denying a license. *FB/PBS* [sic] requires only a prompt judicial hearing, a standard that the order meets by giving an unsuccessful license applicant 30 days to appeal to a district court in Denton County "on a trial de novo basis." The availability of expeditious judicial review obviates the need for automatic stay. Citation omitted page 709.

The court concludes that the license renewal scheme of 8.195 obviates the need for an automatic stay. The application must be filed at least 60 days before the license terminates; the applicant must be notified within 20 days of the grant or denial; review by ordinance or chapter 68 can be completed within 10 to 15 days. A hearing on the appeal under 68.10 must be heard within

15 days and a determination made within 20 days of the completion of the hearing under 68.12. The scheme provides that most of the review process can be completed prior to the expiration of the one year term of the license.

On the question of whether the ordinance on its face provides for prompt judicial review, the court has read the cases and arguments presented by both counsel. The court concludes that the ordinance in Section 8.195(11) provides access to prompt judicial review under Wisconsin Statute Chapter 68. Section 68.001 provides as follows:

> 68.001. Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. Constitution.

In particular, the judicial review by certiorari can be accessed under 68.10(1) (b) as well as after the decision by the Administrative Review Board. Under the circumstances, this court finds the ruling in *Graff v. City of Chicago*, 9 F.3d 1309, (7th Cir., 1993) supports the court's conclusion.

Plaintiff at the time of the Board hearing raised the due process issue concerning an impartial tribunal. Plaintiff specifically challenged Mayor Opel and Alderman Seidl because the two had "participated" in the Common Council meetings which passed a resolution denying plaintiff's renewal of the license. Counsel for the plaintiff argued that the Mayor and alderman were there:

> "The fact is he was there. The fact is he heard the debate. The fact is that he had this collegial association with the rest of the Common Council as did your Honor, the Mayor." (Transcript of April 12, 1996, page 14).

The members of the board responded to the challenge. The court finds that none of the cases cited by the plaintiff in this regard bear upon the situation presented. Upon review of the *DeLuca v. Common Council* decision at 72 Wis. 2d, 672 (1976), this court finds that plaintiff was not denied an impartial decision maker for the following reasons:

(1) Mayor Opel and Alderman Seidl were not reviewing their own decisions because they had not presented, argued, or voted on the Resolution in question.

(2) The Mayor was obliged by statute to conduct Common Council meetings as part of her duties and the city's rules of order; likewise, the alderman was obligated to attend the Council meetings.

(3) The Mayor and the alderman sit on the administrative review board pursuant to the city's ordinances; they are not volunteers.

(4) The Mayor as part of municipal procedure always signs, along with the clerk, any resolution of the Common Council. This activity is administrative in nature to provide authenticity to the document, not to pass on the merits of the legislation. This procedure is followed for resolutions and ordinances in most municipalities.

(5) Nothing in the record shows that the two individuals should be disqualified or precluded from the

administrative review board by prior conduct. There is no prohibition or disqualification in that the adjudicators heard the details of the Resolution (allegations) or the debate involving said Resolution.

(6) While the *DeLuca* case rejected a finding using hindsight, for completeness sake this court notes that Mayor Opel conducted the protracted and often contentious hearing in a fair and proper manner. She often deferred to and looked for guidance from the legal counsel for the board. Nothing in the questions or statements by either the Mayor or Alderman Seidl demonstrate partiality or a closed mind to the plaintiff's positions.

The plaintiff contends that the review board found that the plaintiff had committed a violation of the open booth provision on a totally different date than alleged in the Resolution. The Resolution of December 19, 1995, indicates that:

> WHEREAS on "November 30, 1994, December 1, 1994, and December 2, 1994, City News & Novelty, Inc., through its employees and/or agents violated the provisions of section 8.195(9) (b) (3) of the Waukesha Municipal Code by failing to have every booth, room, or cubicle totally open to a public lighted aisle so that permitting an unobstructed view of all times of anyone occupying same.
>
> WHEREAS each of the violations set forth above resulted in five convictions in municipal courts in the city of Waukesha during 1995 license year.

At the hearing, Marv Lemke, house inspector for the city, testified that his recollection was that on November 7, 1994, the booths had been improperly narrowed; that

on either November 9 or 10 he dropped off some literature with a Mr. Bishop at the establishment and observed that the booths were not in compliance. His testimony at the hearing further indicated he recalls dropping off some literature on November 28 and again observing the booths not in compliance. He further testified at the hearing that on November 30 his inspection of the establishment indicated the booths had been cut back as well as an observation on December 9 that the booths had been cut back. (April 2, 1996, transcript pages 280-282). Plaintiff further introduced Exhibits 24 and 25 which represent memos made Lemke on March 29, 1996, and 12-9-1994 respectively. The Board in its findings and conclusions found that the open booth violation had occurred on November 7, 1994, the date of Inspector Lemke's first visit (Section 16 B.1 page 8 and 9). Because City News and Novelty was given no notice that a violation was alleged to have occurred on November 7, 1995, and because the plaintiff never received the citation for a problem on November 7, notice of this violation was not given and constitutes unlawful action by the Board and an improper basis for denying renewal of license.

The court concludes that the plaintiff had been notified with sufficient and reasonable particularity regarding the times and dates of offenses sufficient to meet the accusations and prepare to defend against it for the following reasons:

(1) Plaintiff admits in their brief on page 27 that they had received citations for activities on November 30, 1994, and subsequent dates involving the booths and had been convicted in municipal court in 1995 based on testimony from Inspector Lemke.

(2) The Resolution refers to the citations and the particular section involving the booths that the city was concerned about. The record indicates that Inspector Lemke has conversations about the booths with employees of City News & Novelty in November and December of 1994.

(3) These contacts referred to wooden panels observed affixed to the booths at the rear of plaintiff's store during November of 1994.

(4) The plaintiff has made no showing that he has been unable to respond or prevented from mounting a defense to the existence or nonexistence of wooden infringements on the sides of the booths.

Plaintiff cites evidence that was introduced at the administrative review hearing which were beyond the allegations set out in December 19, 1995, Resolution. These consist of the board hearing the testimony of Timothy Morgan regarding an incident on March 7, 1976, not referred to in the Resolution. Plaintiff also criticizes the receipt of the following exhibits: No. 33, a witness statement taken by Officer Conkle of Sonny Dietscher; No. 43, the record of conviction for Timothy Morgan for retail theft; Exhibit 35, a subpoena for a David Hull; Exhibit 36, a copy of the complaint of a 1990 lawsuit involving the plaintiff; Exhibit 37, the citation issued to a Jaimie Barr in April of 1994 for sale or displays of sexual materials to a minor. The court finds that the testimony of Timothy Morgan was objected to by plaintiff's counsel in a timely fashion as were the other exhibits listed above. With respect to Mr. Morgan and all of the exhibits listed, the decision of the board did not include any findings with

respect to the credibility of Mr. Hull or Mr. Morgan and did not make any findings with respect to the exhibits objected to by the plaintiff. The rulings of the Administrative Review Board indicate that they relief on the testimony of police officers and their observations concerning activities of minors and others at the plaintiff's store. The Board found that the testimony of the officers was unrefuted. Nowhere in the record does the court glean that the introduction of these exhibits and the testimony of Mr. Morgan were considered as a basis for denial and therefore the opportunity and elements of due process with respect to notice have not been violated. Indeed the Board kept within the allegations of which City News & Novelty had prior notice.

The plaintiff argues that the license should have been suspended rather than denied. The matter of whether to suspend rather than deny renewal is a matter within the discretion of the licensing authority. The court cannot substitute or exercise its own discretion on certiorari review. The number, nature and timing of the violations found by the Board gave a reasonable basis for the denial of the plaintiff's renewal application. Because there have been no recent violations, the Board could have ruled otherwise; they chose not to do so.

The last complaint of the plaintiff is that the evidence on which the nonrenewal was affirmed was inadequate as a matter of law. The court disagrees with plaintiff's analysis that the actions of patrons cannot be grounds for disqualification. Sections 8.195(9) (c), (10) (b) and (10) (f) apply to hold the operator responsible for activity observed by Officers Gibbs and De Jarlais at City News & Novelty. Plaintiff attacks the Board's "findings" with

respect to minors being present in the store. Because the plaintiff has not been convicted, even in municipal court, the evidence cannot serve as a basis for the denial of a license. The record is supported by substantial evidence that the minors were allowed to loiter around or frequent the store. The evidence for the finding of responsibility of the operator under 8.195(10) (c) and (b) comes from the line of testimony of four police officers. The Board's factual findings are supported by substantial and credible evidence in the record. This court concludes that the facts of record constitute violations of the ordinance as specified by the Board.

Plaintiff argues in his brief that the citations issued to Peggy Lindsley, employee, and Daniel Bishop, a director of City News & Novelty, are on appeal. Plaintiff later notes in a letter that the convictions have been vacated. The court on certiorari cannot add to the record or take new evidence except in unusual circumstances. This court concludes that the issuance of the citations revolve around police officers observing a patron who was a minor on December 24, 1994. There is not subjective discretion exercised by Officer Piagentini when he testifies to the fact a patron at the store was a minor; there is no subjective discretion exercised by the Board in finding the testimony credible.

The court concludes that the ordinance in question survives the constitutional challenges brought by the plaintiff; that plaintiff, was accorded due process with respect to the hearings before the Administrative Review Board; and finds that the evidence upon which the Review Board's findings are based represents relative and probative evidence. Such evidence that a fact-finder

could base conclusions that violations of the ordinance had occurred and that the Council was empowered to deny renewal of plaintiff's license. Accordingly the court affirms the decision of the Administrative Review Board for the City of Waukesha.

By the Court:

/s/ Robert G. Mawdsley
Robert G. Mawdsley
4/2/97

CITY OF WAUKESHA
ADMINISTRATIVE REVIEW APPEALS BOARD

RE: IN THE MATTER OF THE NONRENEWAL OF ADULT ORIENTED ESTABLISHMENT LICENSE OF CITY NEWS AND NOVELTY, INC.

FINDINGS, CONCLUSIONS AND DECISION

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1. On November 15, 1995, City News and Novelty, Inc. applied to renew its adult oriented establishment license under the provisions of Section 8.195 of the Municipal Code of Waukesha for the license year commencing January 26, 1996. City News and Novelty, Inc., is the corporate licensee and operator of the adult oriented establishment located at 245 W. Main Street in the City of Waukesha. City News and Novelty, Inc. is subject to the provisions of Section 8.195 of the Municipal Code of Waukesha.

2. On December 19, 1995, the Common Council of the City of Waukesha passed Resolution R88-95 in which it determined not to renew the adult oriented establishment license of City News and Novelty, Inc. issued under the provisions of Section 8.195 of the Municipal Code of Waukesha.

3. Pursuant to Section 68.08, Wis. Stats., a request was made by City News and Novelty, Inc. to and for the Common Council to review its December 19, 1995 Initial Determination.

4. On January 22, 1996, the Common Council rendered by motion duly made, seconded and unanimously adopted a Decision on Review issued by letter dated January 23, 1996, in which it affirmed its December 19, 1995 Initial Determination.

5. Pursuant to Section 68.10, Wis. Stats., City News and Novelty, Inc. appealed the Decision on Review

issued by the Common Council to the City of Waukesha Administrative Review Appeals Board (hereinafter "the Board").

6. City News and Novelty, Inc. waived the time periods for this administrative review pursuant to Section 68.11, Wis. Stats., and the time period for the Board to make a final determination pursuant to Section 68.12, Wis. Stats.

7. Pursuant to Section 68.12, Wis. Stats. and Section 2.11 of the Municipal Code of Waukesha, an administrative hearing was held before the Board on April 2 and 9, and May 7 and 8, 1996 and the Board deliberated the case on June 10, 18, 25 and 28, 1996. The Common Council was represented by City Attorney Curt Meitz, City News and Novelty, Inc., the operator and licensee, was represented by attorneys Jeff Scott Olson and Percy Julian and the Board, comprised of Mayor Carol A. Opel, Ralph M. North III, and Alderman Jerome A. Seidl, was represented by Attorney John P. Macy.

   The hearing was transcribed by a court reporter, witnesses were sworn, exhibits marked and preserved, and attorneys were allowed to cross examine witnesses called by the opposing side.

8. Prior to the testimony being heard, City News and Novelty, Inc. challenged the impartiality of Mayor Opel and Ald. Seidl and requested that they disqualify themselves from hearing this appeal. Both Mayor Opel and Ald. Seidl find that they did not vote upon any decision or participate in any discussion made by the Common Council in rendering its Initial Decision and Determination on Review. Further, they both find that they are not prejudiced in this matter and are impartial decision makers. Therefore, the Board rejects the challenge of City News and Novelty, Inc. in this regard.

9. Prior to the testimony being heard, the parties stipulated to the following:

   A. Request for Review of Initial Determination was timely filed.

   B. Request to appeal the Decision of Review was timely filed.

   C. Hearing has been timely scheduled.

   D. All notice requirements have been satisfied.

   E. The court reporter would swear in the witnesses.

10. Prior to the testimony being heard, City News and Novelty, Inc. questioned the order of the hearing. The Board ruled that the Applicant would go first.

11. Prior to the testimony being heard, City News and Novelty, Inc. asked that the Board make a determination that the Common Council has the burden of proof in this matter. The Board took the issue under advisement.

12. Pursuant to Section 8.195 Municipal Code of Waukesha the purpose and rationale of licensing adult oriented establishments are as set forth in the preamble of Section 8.195 of the Municipal Code of Waukesha and are to combat and curb the adverse secondary effects brought on by adult oriented establishments; to protect the health, safety and welfare of the citizens of Waukesha from increased crime including sex related crimes; to preserve and stabilize its neighborhoods and to minimize the transmission of sexual diseases; but not to have the purpose or effect of imposing a limitation or restriction on the content of any communicative materials. Secondary effects of adult oriented establishments include contributing to physical deterioration and

blight of a neighborhood, a deleterious effect on both existing businesses around adult oriented establishments and surrounding residential areas, including increased transience and increased levels of criminal activities, including sex related crimes. In addition, studies from other communities relied upon by the Common Council found that viewing booths in adult oriented establishments have been and are being used by patrons of said establishments for engaging in sexual acts resulting in unsafe and unsanitary conditions in said booths.

13. Pursuant to Section 8.195 of the Municipal Code of Waukesha, the standards for issuance of license (i.e., to receive a new or renewal license to operate) are as set forth in Subsection 8.195 (4).

14. In that City News and Novelty, Inc. is a corporation, the standards for renewal are as set forth in Subsection 8.195 (4)(b) of the Municipal Code of Waukesha.

15. There is no evidence that there is a violation of Subsection 8.195 (4)(b)1 of the Municipal Code of Waukesha which requires that all officers, directors and stockholders required to be named under Subsection 8.195(3)(b) of the Municipal Code of the Waukesha shall be at least 18 years of age.

16. There is evidence that there are violations of Subsection 8.195 (4)(b)2 of the Municipal Code of Waukesha which requires that officers, directors or stockholders required to be named under Subsection 8.195 (3)(b) of the Municipal Code of Waukesha have violated Subsections of Section 8.195 of the Municipal Code of Waukesha within 5 years immediately preceding the date of the application.

   A. Subsection 8.195 (10)(c) of the Municipal Code of Waukesha has been violated since it provides

that no employee of an adult oriented establishment shall allow any minor to loiter around or frequent in an adult oriented establishment or allow a minor to view adult entertainment as defined herein. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(b) provides that any act or omission of an employee constituting a violation of the provisions of Section 8.195 shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed and because operator is defined in Section 8.195 of the Municipal Code of Waukesha as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On December 24, 1994, Officer Richard Piagentini observed a patron at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Piagentini made the observation while on patrol. Peggy Lindsley, the employee on duty at the time, and Daniel Bishop, a director of City News and Novelty, Inc., were both convicted of civil ordinance violations contrary to Section 8.195. Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Officer Piagentini.

2. On July 23, 1995, Officer John Konkol observed S.S., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the

City of Waukesha, who was a minor. Officer Konkol made the observation while on duty. Additionally, S.S. testified that she was a patron at City News and Novelty, Inc. at 245 W. Main Street in the City on July 23, 1995 and on said date she was a minor. Christopher Alverson, the employee on duty at the time, was convicted of a civil ordinance violation contrary to Section 8.195, Subsection 8.195(10(c) of the Municipal Code of Waukesha on August 25, 1995. There was no evidence to refute the credible testimony of Officer Konkol or S.S.

3. On October 18, 1995, Officer Mark Howard, observed S.D., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Howard made the observation during the course of a routine investigation. Additionally, S.D. testified that he was a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha on October 18, 1995 and on said date he was a minor. There was no evidence to refute the credible testimony of Officer Howard and S.D.

4. On November 29, 1995, Officer Paul Paikowski observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Paikowski made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There was no evidence to refute the credible testimony of Officer Paikowski.

B. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(b)2 requires that every booth, room or cubicle shall have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds that the following specific violation:

1. On November 7, 1994, Building Inspector Marv Lemke observed at 245 W. Main Street in the City of Waukesha that wood panels had been installed perpendicular to the front of the interior partition of viewing booths between 9 and 11 inches in width having the effect of narrowing the booth openings by approximately 1/3 since his previous inspection the year before. The wood panels narrowed the opening of the booths and obstructed the view of someone looking into the booth contrary to the requirement that at least one side be totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. The wood panels were not necessary for the structural stability of the booth. Daniel L. Bishop, a director of City News and Novelty, Inc. was convicted

of three (3) civil ordinance violations contrary to Section 8.195, Subsection 8.195(9)(b)(2) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Building Inspector Lemke.

C. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(c) requires that no occupants of a booth, room or cubicle shall engage in any type of sexual activity. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On February 28, 1995, Officer John Gibbs observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, masturbating in a viewing booth. Officer Gibbs made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20 Wis. Stats. There was no testimony presented to refute the credible testimony of Officer Gibbs.

2. On March 11, 1995, Officer Paul De Jarlais observed a patron at City News and Novelty, Inc. at 245 W. Main St. in the City of Waukesha, masturbating in a viewing booth. Officer De Jarlais made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. There was no testimony presented to refute the credible testimony of Officer De Jarlais.

17. In consideration of the issue of which party bears the burden of proof, the Board concludes that City News and Novelty, Inc., as applicant, had an initial burden of showing, as a minimum, that all jurisdictional requirements to effectuate an appeal to the Board pursuant to Chapter 68, Wisconsin Statutes, were satisfied.

18. In consideration of the issue of which party bears the ultimate burden of proof, the Board has considered special policy considerations, judicial estimate of probabilities, convenience, fairness factors and the natural tendency to place the burden on the party desiring change. The Common Council has permitted City News and Novelty, Inc. to continue its business operation pending the determination of the Board after a due process hearing. Therefore, the City desires a change in the status quo. Moreover, special policy considerations argue strongly in favor of requiring the City to set out facts in support of the Common Council's decision not to renew. The City has the convenience of facts at its command and is

able to provide the Board with information in support of its belief that nonrenewal is appropriate. Finally, the notion of requiring a party to prove lack of violations is of questionable fairness. Therefore, the Board concludes that the City bears the ultimate burden of proof.

19. The Board further concludes that, irrespective of the order of proof during the hearing, all due process requirements have been satisfied in that both parties were afforded full opportunity to present any and all evidence in support of their respective positions; neither party was prejudiced in any manner by the order of proof; and the hearing afforded both parties a constitutionally sufficient, fair and orderly administrative procedure to review the determination of the Common Council.

20. Based on the foregoing findings and conclusions and all of the documentation and testimonial evidence, the Board decides that there is substantial evidence in the record and a reasonable basis to conclude that the decision of the Common Council be upheld and that the adult-oriented establishment license of City News and Novelty, Inc. not be renewed for the license year 1996. The Board, therefore, affirms that decision.

These Findings, Conclusions and Decision of the City of Waukesha Administrative Review Appeals Board are unanimously adopted this 28th day of June, 1996.

/s/ Carol A. Opel
Carol A. Opel, Mayor

/s/ Jerome A. Seidl
Jerome A. Seidl, Alderman

/s/ Ralph M. North III
Ralph M. North III, Citizen

CITY OF WAUKESHA
CITY COUNSEL

RE: IN THE MATTER OF THE NONRENEWAL OF ADULT ORIENTED ESTABLISHMENT LICENSE OF CITY NEWS AND NOVELTY, INC.

RESOLUTION

WHEREAS, City News and Novelty, Inc. is licensed to operate an adult oriented establishment pursuant to the provisions of section 8.195 of the Waukesha Municipal Code at 245 W. Main Street, Waukesha, Wisconsin, for the license year commencing January 26, 1995 and expiring on January 25, 1996; and

WHEREAS, on 12/24/94 City News and Novelty, Inc. through its employees and/or agents permitted minors to loiter contrary to the provisions of section 8.195(10) of the Waukesha Municipal Code; and

WHEREAS, on 11/30/94, 12/1/94 and 12/2/94 City News and Novelty, Inc. through its employees and/or agents violated the provisions of section 8.195(9)(b)2 of the Waukesha Municipal Code by failing to have every booth, room or cubical totally open to a public lighted aisle so that permitting an unobstructed view at all times of anyone occupying the same; and

WHEREAS, each of the violations set forth above resulted in five (5) convictions in Municipal Court in the City of Waukesha during the 1995 license year; and

WHEREAS, on July 23, 1995, October 18, 1995, and November 29, 1995, minors were permitted to loiter on

the subject premises contrary to section 8.195(10) of the Waukesha Municipal Code; and

WHEREAS, on 9/12/94 a patron of City News and Novelty, Inc. was arrested for exposing himself to an employee. The patron was convicted of the criminal charge of lewd and lacivious [sic] conduct on April 12, 1995 contrary to section 944.20 of the Wisconsin Statutes; and

WHEREAS, on 2/28/95 a patron of City News and Novelty, Inc. engaged in sexual conduct inside a viewing booth and was observed by a police officer. The patron was convicted of lewd and lascivious conduct on 11/2/95 contrary to section 944.20 of the Wisconsin Statutes. This activity is also contrary to the provision of section 8.195(9)(c) of the Waukesha Municipal Code; and

WHEREAS, on 3/12/95 a patron of City News and Novelty, Inc. engaged in sexual conduct inside a viewing booth and was observed by a police officer. The patron was convicted of lewd and lascivious conduct on 12/1/95 contrary to section 944.20 of the Wisconsin Statutes. This activity is also contrary to the provision of section 8.195(9)(c) of the Waukesha Municipal Code.

NOW, THEREFORE, BE IT RESOLVED that based upon the aforementioned convictions and violations, and sexual activity occurring in the viewing booths on the premises which occurred during the license year 1995, the Common Council of the City of Waukesha and hereby denies the renewal of an Adult Oriented Establishment License for City News and Novelty, Inc. for the license year 1996 commencing January 26, 1996.

BE IT FURTHER RESOLVED, that City News and Novelty has the right to have this determination reviewed within 30 days of receipt of this notice by requesting a review by the Common Council. The request for review shall be submitted to the City Clerk and shall state the grounds upon which City News and Novelty, Inc. contends that the determination should be modified or reversed.

BE IT FURTHER RESOLVED, that the procedures and provisions of sec. 68.08 through 68.12 of the Wisconsin Statutes and sec. 2.11 of the Waukesha Municipal Code shall apply in the review process of this determination.

Approved this 19th day of December, 1995.

/s/ Carol A. Opel
Carol A. Opel, Mayor

Attest:

/s/ Thomas E. Neill
Tom Neill
Clerk/Treasurer

CHAPTER 68

MUNICIPAL ADMINISTRATIVE PROCEDURE

68.001 Legislative purpose.
68.01 Review of administrative determinations.
68.02 Determinations reviewable.
68.03 Determinations not subject to review.
68.04 Municipalities included.
68.05 Municipal authority defined.
68.06 Persons aggrieved.
68.07 Reducing determination to writing.
68.08 Request for review of determination.
68.09 Review of determination.
68.10 Administrative appeal.
68.11 Hearing on administrative appeal.
68.12 Final determination.
68.13 Judicial review.
68.14 Legislative review.
68.15 Availability of methods of resolving disputes.
68.16 Election not to be governed by this chapter.

68.001 Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

History: 1975 c. 295.

Investigatory and adjudicatory functions in administrative proceedings discussed. State ex rel. DeLuca v. Common Council, 72 W. 2d 672, 242 N.W.2d 689.

68.01 Review of administrative determinations. Any person having a substantial interest which is

adversely affected by an administrative determination of a governing body, board, commission, committee, agency, officer or employe of a municipality or agent acting on behalf of a municipality as set forth in s. 68.02, may have such determination reviewed as provided in this chapter. The remedies under this chapter shall not be exclusive. No department, board, commission, agency, officer or employe of a municipality who is aggrieved may initiate review under this chapter of a determination of any other department, board, commission, agency, officer or employe of the same municipality, but may respond or intervene in a review proceeding under this chapter initiated by another.

History: 1975 c. 295.

68.02 Determinations reviewable. The following determinations are reviewable under this chapter:

(1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.

(2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03 (5).

(3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.

(4) The imposition of a penalty or sanction upon any person except a municipal employe or officer, other than by a court.

History: 1975 c. 295; 1981 c. 79.

68.03 Determinations not subject to review. Except as provided in s. 68.02, the following determinations are not reviewable under this chapter:

(1) A legislative enactment. A legislative enactment is an ordinance, resolution or adopted motion of the governing body of a municipality.

(2) Any action subject to administrative or judicial review procedures under other statutes.

(3) The denial of a tort or contract claim for money, required to be filed with the municipality pursuant to statutory procedures for the filing of such claims.

(4) The suspension, removal or disciplining or nonrenewal of a contract of a municipal employe or officer.

(5) The grant, denial, suspension or revocation of an alcohol beverage license under s. 125.12 (1).

(6) Judgments and orders of a court.

(7) Determinations made during municipal labor negotiations.

(8) Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16.

(9) Notwithstanding any other provision of this chapter, any action or determination of a municipal authority which does not involve the constitutionally protected right of a specific person or persons to due process in connection with the action or determination.

History: 1975 c. 295; 1981 c. 79.

68.04 Municipalities included. "Municipality", as used in this chapter, includes any county, city, village, town, technical college district, special purpose district or board or commission thereof, and any public or quasi-public corporation or board or commission created pursuant to statute, ordinance or resolution, but does not include the state, a state agency, a corporation chartered by the state or a school district as defined in s. 115.01 (3).

History: 1975 c. 295; 1993 a. 399.

68.05 Municipal authority defined. "Municipal authority" includes every municipality and governing body, board, commission, committee, agency, officer, employe, or agent thereof making a determination under s. 68.01, and every person, committee or agency of a municipality appointed to make an independent review under s. 68.09 (2).

History: 1975 c. 295.

68.06 Persons aggrieved. A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination of a municipal authority.

History: 1975 c. 295; 1993 a. 112.

68.07 Reducing determination to writing. If a determination subject to this chapter is made orally or, if in writing, does not state the reasons therefor, the municipal authority making such determination shall, upon

written request of any person aggrieved by such determination made within 10 days of notice of such determination, reduce the determination and the reasons therefor to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and shall advise such person of the right to have such determination reviewed, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed.

History: 1975 c. 295, 421.

68.08 Request for review of determination. Any person aggrieved may have a written or oral determination reviewed by written request mailed or delivered to the municipal authority which made such determination within 30 days of notice to such person of such determination. The request for review shall state the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed. A request for review shall be made to the officer, employe, agent, agency, committee, board, commission or body who made the determination but failure to make such request to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.

History: 1975 c. 295.

68.09 Review of determination. (1) INITIAL DETERMINATION. If a request for review is made under s. 68.08, the determination to be reviewed shall be termed an initial determination.

(2) WHO SHALL MAKE REVIEW. A review under this section may be made by the officer, employe, agent, agency, committee, board, commission or body who made the initial determination. However, an independent review of such initial determination by another person, committee or agency of the municipality may be provided by the municipality.

(3) WHEN TO MAKE REVIEW. The municipal authority shall review the initial determination within 15 days of receipt of a request for review. The time for review may be extended by agreement with the person aggrieved.

(4) RIGHT TO PRESENT EVIDENCE AND ARGUMENT. The person aggrieved may file with the request for review or within the time agreed with the municipal authority written evidence and argument in support of the person's position with respect to the initial determination.

(5) DECISION ON REVIEW. The municipal authority may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a copy of the municipal authority's decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken and the office or person with whom notice of appeal shall be filed.

History: 1975 c. 295, 421.

68.10 Administrative appeal. (1) FROM INITIAL DETERMINATION OR DECISION ON REVIEW. (a) If the person aggrieved did not have a hearing substantially in compliance with s.

68.11 when the initial determination was made, the person may appeal under this section from the decision on review and shall follow the procedures set forth in ss. 68.08 and 68.09.

(b) If the person aggrieved had a hearing substantially in compliance with s. 68.11 when the initial determination was made, the person may elect to follow the procedures provided in ss. 68.08 and 68.09, but is not entitled to appeal under this section unless granted by the municipal authority. The person may, however, seek review under s. 68.13.

(2) TIME WITHIN WHICH APPEAL MAY BE TAKEN UNDER THIS SECTION. Appeal from a decision on review under s. 68.09 shall be taken within 30 days of notice of such decision.

(3) HOW APPEAL MAY BE TAKEN. An appeal under this section may be taken by filing with or mailing to the office or person designated in the municipal authority's decision on review, written notice of appeal.

History: 1975 c. 295, 421.

68.11 Hearing on administrative appeal. (1) TIME OF HEARING. The municipality shall provide the appellant a hearing on an appeal under s. 68.10 within 15 days of receipt of the notice of appeal filed or mailed under s. 68.10 and shall serve the appellant with notice of such hearing by mail or personal service at least 10 days before such hearing.

(2) CONDUCT OF HEARING. At the hearing, the appellant and the municipal authority may be represented by an attorney and may present evidence and call and examine witnesses and cross-examine witnesses of the other

party. Such witnesses shall be sworn by the person conducting the hearing. The municipality shall provide an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal. The decision maker may issue subpoenas. An appellant's attorney of record may issue a subpoena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in s. 805.07 (4) and must be served in the manner provided in s. 805.07 (5). The attorney shall, at the time of issuance, send a copy of the subpoena to the decision maker. The hearing may, however, be conducted by an impartial person, committee, board or commission designated to conduct the hearing and report to the decision maker.

(3) RECORD OF HEARING. The person conducting the hearing or a person employed for that purpose shall take notes of the testimony and shall mark and preserve all exhibits. The person conducting the hearing may, and upon request of the appellant shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the municipality.

History: 1975 c. 295; 1989 a. 139.

68.12 Final determination. (1) Within 20 days of completion of the hearing conducted under s. 68.11 and the filing of briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.

(2) A determination following a hearing substantially meeting the requirements of s. 68.11 or a decision on review under s. 68.09 following such hearing shall also be a final determination.

History: 1975 c. 295.

68.13 Judicial review. (1) Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

(2) If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript. By stipulation, the court may order a synopsis of the proceedings in lieu of a transcript. The court may otherwise limit the requirement for a transcript.

History: 1975 c. 295, 421; 1981 c. 289.

Judicial Council Note, 1981: Reference in sub. (1) to a "writ" of certiorari has been removed because that remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613-A]

68.14 Legislative review. (1) The seeking of a review pursuant to s. 68.10 or 68.13 does not preclude a

person aggrieved from seeking relief from the governing body of the municipality or any of its boards, commissions, committees, or agencies which may have jurisdiction.

(2) If in the course of legislative review under this section, a determination is modified, such modification and any evidence adduced before the governing body, board, commission, committee or agency shall be made part of the record on review under s. 68.13.

(3) The governing body, board, commission, committee or agency conducting a legislative review under this section need not conduct the type of hearing required under s. 68.11.

History: 1975 c. 295.

68.15 Availability of methods of resolving disputes. This chapter does not preclude any municipality and person aggrieved from employing arbitration, mediation or other methods of resolving disputes, and does not supersede contractual provisions for that purpose.

History: 1975 c. 295.

68.16 Election not to be governed by this chapter. The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.

History: 1975 c. 295.

8.195 Adult Oriented Establishments

(as of December 19, 1995)

WHEREAS, it is a lawful purpose of the Common Council for the City of Waukesha to enact regulatory ordinances protecting and promoting the general welfare, health and safety of its citizens; and

WHEREAS, the City is empowered to enact such ordinances pursuant to the Constitution and Laws of the State of Wisconsin; and

WHEREAS, the Common Council, based on the experience of other cities including Seattle and Renton, Washington, and Detroit, Michigan, has previously determined as set forth in sec. 22.50 of the Waukesha Municipal Code that adult oriented establishments can contribute to the impairment of the character and quality of surrounding residential neighborhoods, and contribute to the decline and the value of surrounding properties; and

WHEREAS, further studies in other communities across the United States such as St. Paul, Minnesota; Indianapolis, Indiana; Austin, Texas and Phoenix, Arizona have documented that the secondary effects of adult oriented establishments affect property values, contribute to physical deterioration and blight, have a deleterious effect on both existing businesses around them and surrounding residential areas, including increased transiency, increased levels of criminal activities including prostitution, rape, assaults and other sex related crimes; and

WHEREAS, the Common Council believes that the experiences and studies of other communities set forth

herein are relevant in addressing the secondary effects adult oriented establishments can have upon areas surrounding such establishments in the City of Waukesha; and

WHEREAS, many adult oriented establishments install booths with doors in which patrons can view adult oriented movies or video tapes or films or view other forms of adult entertainment; and

WHEREAS, it is has been found in Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana, to name a few locales, that the viewing booths in adult oriented establishment have been and are being used by patrons of said establishments for engaging in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation and masturbation, resulting in unsafe and unsanitary conditions in said booths; and

WHEREAS, Acquired Immune Deficiency Syndrome (AIDS) is a sexually transmitted disease which destroys the body's immune system, is always fatal, and has no known cure; and

WHEREAS, when this ordinance was originally enacted in 1989, statistics from the State of Wisconsin had indicated that as of July 25, 1986, 96 cases of AIDS were reported in the State including 54 that resulted in death and that Wisconsin could expect a ten fold increase in reported cases between 1986 and 1991; and

WHEREAS, as of January 1, 1995, the State of Wisconsin Department of Health and Social Services, Division of Public Health is projecting between 900-1300 new cases of AIDS during 1995 and 1996.

WHEREAS, the viral agents responsible for AIDS and other sexually transmitted diseases have all been isolated at one time or another from semen; and

WHEREAS, the City of Waukesha desires to combat and curb the adverse secondary effects brought on by adult oriented establishments and to protect the health, safety, and welfare of its citizens from increased crime, and to preserve and stabilize the neighborhoods of the City of Waukesha, and to minimize the transmission of sexual diseases including AIDS; and

WHEREAS, although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments including, but not limited to, adult bookstores, adult minimotion picture establishments, adult motion picture theaters and adult cabarets to combat and curb the secondary effects of such establishments.

NOW, THEREFORE, the Common Council of the City of Waukesha do ordain as follows:

ADULT ORIENTED ESTABLISHMENTS.

(1) DEFINITIONS:

Adult Bookstore. An establishment which has a facility or facilities, including but not limited to booths, cubicles, rooms or stalls, for the presentation of "adult entertainment", as defined below, including adult oriented films, movies or live performances for observation by patrons therein; or an establishment having as a substantial or significant portion of its stock in trade, for sale, rent, trade, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities as defined below.

Adult Cabaret. A cabaret which features topless dancers, strippers, male or female impersonators or similar entertainers.

Adult Entertainment. Any exhibition of any motion picture, live performance, display or dance of any type, which has as its dominant theme or is distinguished or characterized by an emphasis on any actual or simulated specified sexual activities or specified anatomical areas as herein defined.

Adult Mini-Motion Picture Theater. An enclosed building with a capacity of less than 50 persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as herein defined for observation by patrons therein.

Adult Motion Picture Theater. An enclosed building with a capacity of 50 or more persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as defined below for observation by patrons therein.

Adult Oriented Establishment. Any premises including, but not limited to, "adult bookstores", "adult motion picture theaters", "adult mini-motion picture establishments" or "adult cabarets." It further means any premises to which public patrons or members are invited or admitted and which are so physically arranged so as to provide booths, cubicles, rooms, compartments, or stalls separate from the common area of the premises for the purposes of viewing adult oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, whether or not such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect. "Adult Oriented Establishment" further includes without being limited to any "adult entertainment studio" or any premises that is physically arranged and used as such whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, modeling studio, or any other term of like import.

"Booths", "Cubicles", "Rooms", "Compartments" or "Stalls". Enclosures as are specifically offered to the public or members of an adult-oriented establishment for hire or for a fee as part of a business operated on the premises which offers as part of its business the entertainment to

be viewed within the enclosure. This shall include, without limitation, such enclosures wherein the entertainment is dispensed for a fee, but a fee is not charged for mere access to the enclosure. However, "booth", "cubicle", "room", "compartment" or "stall" does not mean such enclosures that are private offices used by the owners, managers or persons employed on the premises for attending to the tasks of their employment, which enclosures are not held out to the public or members of the establishment for hire or for a fee or for the purpose of viewing entertainment for a fee, are not open to any persons other than employees; nor shall this definition apply to hotels, motels or other similar establishments licensed by the State of Wisconsin pursuant to Chapter 50 of the Wisconsin Statutes.

Council. The City Council for the City of Waukesha, Waukesha County, Wisconsin.

Operators. Any person, partnership, or corporation operating, conducting, maintaining or owning any adult-oriented establishment.

Specified Anatomical Areas.

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, and female breasts below the point immediately above the top of the areola.

2. Human male genitals in a discernible turgid state, even if opaquely covered.

Specified Sexual Activities. Simulated or actual:

1. Showing of human genitals in a state of sexual stimulation or arousal.

2. Acts of masturbation, sexual intercourse, sodomy, bestiality, necrophilia, sado-masochistic abuse, fellatio or cunnilingus.

3. Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

(2) LICENSE.

(a) Except as provided in subsection (d) below, from and after the effective date of this section, no adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.

(b) A license may be issued only for one adult oriented establishment located at a fixed and certain place. Any person who desires to operate more than one adult oriented establishment must have a license for each.

(c) No license or interest in a license may be transferred to any person.

(d) All adult oriented establishments existing at the time of the passage of this section must submit an application for a license within 60 days of the passage of this section.

(3) APPLICATION FOR LICENSE.

(a) Any person desiring to secure a license shall make application to the City Clerk. The application shall be filed in triplicate and dated by the City Clerk. A copy of the

application shall be distributed promptly by the City Clerk to the City Police Department and to the applicant.

(b) The application for a license shall be upon a form provided by the City Clerk. An applicant for a license shall furnish the following information under oath:

1. Name and address.

2. Written proof that the individual is at least 18 years of age.

3. The address of the adult oriented establishment to be operated by the applicant.

4. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agents and the name and address of all shareholders owning more than 5% of the stock in such corporation and all officers and directors of the corporation.

(c) Within 21 days of receiving an application for a license, the City Clerk shall notify the applicant whether the application is granted or denied.

(d) Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.

(e) Failure or refusal of the applicant to give any information relevant to the application or his refusal or failure to appear at any reasonable time and place for examination under oath regarding such application or his refusal to submit to or cooperate with regard to any information required by this section shall constitute an admission by the applicant that he is ineligible for such license and shall be grounds for denial thereof by the City Clerk.

(4) STANDARDS FOR ISSUANCE OF LICENSE. To receive a license to operate an adult oriented establishment, an applicant must meet the following standards:

(a) If the applicant is an individual:

1. The applicant must be at least 18 years of age.

2. The applicant shall not have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(b) If the applicant is a corporation:

1. All officers, directors, and stockholders required to be named underpar. (3)(b) shall be at least 18 years of age.

2. No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(c) If the applicant is a partnership, joint venture or any other type of organization where 2 or more persons have a financial interest:

1. All persons having a financial interest in the partnership, joint venture or other type of organization shall be at least 18 years of age.

2. No person having a financial interest in the partnership, joint venture or other type of organization shall have been found to have violated any provision of this section within 5 years immediately preceding the date of the application.

(5) FEES. A license fee of $250 shall be submitted with the application for a license. If the application is denied, 1/2 of the fee shall be returned.

(6) DISPLAY OF LICENSE OR PERMIT. The license shall be displayed in a conspicuous public place in the adult-oriented establishment.

(7) RENEWAL OF LICENSE OR PERMIT.

(a) Every license issued pursuant to this section will terminate at the expiration of one year from date of issuance, unless sooner revoked and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed not later that 60 days before the license expires. The application for renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.

(b) A license renewal fee of $250 shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of $100 shall be assessed against any applicant who files for a renewal less than 60 days before the license expires. If the application is denied, 1/2 of the total fees collected shall be returned.

(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.

(d) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.

(8) REVOCATION OF LICENSE.

(a) The Council shall revoke a license or permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application or material facts were omitted from any application.

2. The operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section provided, however, that in the case of a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of 30 days if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of

due diligence have had such actual or constructive knowledge.

3. The operator becomes ineligible to obtain a license or permit.

4. Any cost or fee required to be paid by this Section is not paid.

5. Any intoxicating liquor or cereal malt beverage is served or consumed on the premises of the adult oriented establishment.

(b) The Council, before revoking or suspending any license or permit, all give the operator at least 10 days written notice of the charges against him and the opportunity for a public hearing before the Council or its designated committee as hereinafter provided.

(c) The transfer of a license or any interest in a license shall automatically and immediately revoke the license.

(d) Any operator whose license is revoked shall not be eligible to receive a license for one year from the date of revocation. No location or premises for which a license has been issued shall be used as an adult oriented establishment for six (6) months from the date of revocation of the license.

(9) PHYSICAL LAYOUT OF ADULT ORIENTED ESTABLISHMENT. Any adult oriented establishment having available for customers, patrons or members, any booth, room or cubicle for the private viewing of any adult entertainment must comply with the following requirements:

(a) Access. Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult oriented establishment and shall be unobstructed by any door, lock or other control-type devices.

(b) Construction. Every booth, room or cubicle shall meet the following construction requirements:

1. Each booth, room or cubicle shall be separated from adjacent booths, rooms or cubicles and any non-public areas by a wall.

2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same.

3. All walls shall be solid and without any openings, extended from the floor to a height of not less than 6 feet and be light colored, non-absorbent, smooth textured and easily cleanable.

4. The floor must be light colored, non-absorbent, smooth textured and easily cleanable.

5. The lighting level of each booth, room or cubicle, when not in use shall be a minimum of ten foot candles at all times, as measured from the floor.

(c) Occupants. Only one individual shall occupy a booth, room or cubicle at any time. No occupants of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

(d) Inspections. (Cr. #5-95) The Building Inspector shall conduct monthly inspections of the premises to insure compliance with the provisions of this subsection.

(10) RESPONSIBILITIES OF THE OPERATOR.

(a) Every act or omission by an employee constituting a violation of the provisions of this Section shall be deemed the act or omission of the operator is such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.

(d) The operator shall maintain the premises in a clean and sanitary manner at all times.

(e) The operator shall maintain at least 10 foot candles of light in the public portions of the establishment, including aisles, at all times. However, if a lesser level of illumination in the aisles shall be necessary to enable a patron to

view the adult entertainment in a booth, room or cubicle adjoining an aisle, a lesser amount of illumination may be maintained in such aisles, provided, however, at no time shall there be less then one foot candle of illumination in said aisles, as measured from the floor.

(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.

(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

(12) PENALTIES AND PROSECUTION. Any person who shall violate any provisions of this Section or who shall fail to obtain a license or permit as required hereunder shall be subject to penalty as provided in § 25.05 of this Municipal Code.

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

(2)

No. 99-1680

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE THE COURT OF APPEALS APPLIED WELL-SETTLED PRINCIPLES OF LAW AS SET FORTH BY THE U.S. SUPREME COURT IN *FW/PBS*

The only Supreme Court jurisdictional rule applicable to this petition is Rule 10(c). Petitioner contends that a state court has decided "an important federal question in a way that conflicts with relevant decisions of this Court." This is not the case because the Wisconsin Court of Appeals analyzed the City of Waukesha's licensing scheme under the guidance of the United States Supreme Court's decision in *FW/PBS v. Dallas*, 493 U.S. 215 (1990). The law is clear in this area and the Court of Appeals has correctly applied the law to the particular facts of this case. The Court of Appeals unequivocally indicated that it applied the constitutional framework in *FW/PBS* to its examination of the City's licensing scheme. (A. 9 to A. 12). Therefore, the criteria for review under Rule 10(c) has not been met and the writ should not be granted.

II. THE COURT OF APPEALS APPLIED THE APPROPRIATE BURDEN OF PROOF IN ANALYZING THE LICENSING SCHEME

The petitioner argues that the Wisconsin Court of Appeals erred by not placing upon the City the burden of proof to establish the constitutionality of the ordinance. As such, petitioner argues that this analysis by the Court of Appeals conflicts with controlling opinions of the U.S.

Supreme Court and other appellate court decisions. (Petition pp. 5-10). The petitioner's argument is a clear misstatement of the law.

The petitioner cites numerous decisions of this Court as holding that any government licensing scheme must be interpreted as a prior restraint, and therefore must be presumed unconstitutional. (Petition p. 5). However, petitioner's argument fails because the City of Waukesha's licensing scheme does not regulate the content of protected speech. It is a content-neutral time, place and manner restriction that has neither the purpose nor effect of imposing any limitation or restriction on the content of any communicative materials sold by the petitioner. The ordinance, unlike the statute at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965) does not create a censor. Therefore, *FW/PBS* correctly distinguished the ordinance at issue there from *Freedman*.

Prior to *FW/PBS*, courts did not apply prior restraint analysis to content-neutral licensing schemes. Instead, courts limited their review to whether the regulations in question were content-neutral time, place, and manner regulations designed to serve a substantial government interest, and did not unreasonably limit alternative avenues of communication. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976). These cases post-date *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), which petitioner cites in support of its argument that the City's ordinance improperly places uncontrolled discretion in the hands of its officials. (Petition p. 11). The Wisconsin Court of Appeals correctly rejected this argument (A. 14) because the ordinance at issue here is entirely different. *Shuttlesworth*

involved an ordinance in which the issuance of parade permits were used as a means of regulating the content of expressive activity. *Renton* and *Young* dealt with exactly the type of content-neutral ordinance that is at issue here. Petitioner fails to make that distinction in its analysis of *Shuttlesworth* and *FW/PBS*.

FW/PBS v. Dallas was the first case that held that content-neutral licensing ordinances required any sort of prior restraint analysis. In a plurality decision, the court concluded that two prior restraint safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), apply to content-neutral licensing schemes. The court also concluded that the third prong of the prior restraint protections – that the governmental authority bore the burden of proving its constitutionality beyond a reasonable doubt – did not apply. 493 U.S. at 228, 246. Justice O'Connor stated that,

> The licensing scheme we examined today is significantly different from the censorship scheme examined in *Freedman*. In *Freedman* the censor engaged in direct censorship of a particular expressive material. Under First Amendment jurisprudence, such regulation of speech is presumptively invalid and therefore the censor in *Freedman* was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court . . . . *We conclude the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court.*

FW/PBS, 493 U.S. at 229-230 (emphasis added).

Following this decision, courts analyzing similar licensing schemes relied upon it to conclude that content-

neutral licensing schemes must meet the first two *Freedman* procedural safeguards that (1) the status quo must be maintained prior to judicial review; and (2) expeditious judicial review must be available. But the third *Freedman* requirement, that the government bore the burden of proving its constitutionality, has not been held applicable. Most notably, the Seventh Circuit so concluded in *Graff v. Chicago*, 9 F.3d 1309 (7th Cir. 1993):

> In *FW/PBS* the Court held that the city of Dallas need not bear the burden of going to court nor the burden of proof once in court for two reasons: The ordinance was not presumptively invalid because the decision maker did not pass "judgment on the content of any protected speech." Also, "[b]ecause the license [or in this case, a permit] is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through the court." 493 U.S. at 229-30.

Graff, 9 F.3d at 1324 n.11. *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995) ("Although the court's opinion was fragmented, six justices agreed that at least the first two requirements in *Freedman* were applicable"). *Id.* at 224 n.4.

Petitioner's assertion (Petition p. 9) that the narrowest reading of *FW/PBS* would entail applying a full prior restraint analysis to all content-neutral licensing schemes is not supported by the law. The narrowest reading of *FW/PBS*, as correctly applied by the Wisconsin Court of Appeals, would extend the least amount of prior restraint analysis to content-neutral licensing schemes and therefore incorporate only the first two prior

restraint safeguards. Thus, consistent with *FW/PBS*, later decisions such as *Graff* and *East Brooks Books* applied the first two prongs of prior restraint analysis but refused to apply the third and allocate the burden to the City to prove the regulations' constitutionality.

The City of Waukesha's adult establishment licensing scheme by its own terms has neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials. The petitioner simply ignores the content-neutral character of the ordinance. The licensing and regulation of adult-oriented establishments as set forth in the Waukesha Code is for the purpose of combating and curbing secondary effects of such establishments. (A. 95 to A. 97). The Waukesha ordinance is in accord with many other ordinances that have been upheld across the nation that advance a substantial governmental interest of combating the secondary effects associated with sexually oriented businesses. *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990); *Berg v. Health & Hospital Corp.*, 865 F.2d 797 (7th Cir. 1989). Ordinances such as Waukesha's have been justified as being narrowly tailored to serve a significant governmental interest. *Id.* Also, *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991). The Court of Appeals further recognized that an identical licensing scheme in relevant part was upheld as being narrowly tailored and furthering a substantial governmental purpose. *Suburban Video, Inc. v. City of Delafield*, 694 F. Supp. 585 (E.D. Wis. 1986). Therefore, the City of Waukesha's adult establishment licensing scheme is content-neutral and not subject to the third *Freedman* procedural safeguard.

Petitioner also ignores the difference between a content-neutral ordinance and a content-based regulatory scheme. In contrast, Wisconsin's courts have clearly shown that they understand the difference between a content-neutral licensing scheme and ordinances which prohibit protected expression. The ordinance in question in *Lounge Management, Ltd. v. Town of Trenton*, 219 Wis.2d 13, 580 N.W.2d 156 (1998) prohibited all public nudity. *Kenosha County v. C & S Management*, 223 Wis.2d 373, 588 N.W.2d 236 (1999), involved an application of § 944.21, Wis. Stats., which prohibits the sale of obscene material. These laws encompassed expressive activities, but had no connection with their secondary effects such as prostitution, sexual assault, and other criminal activities.

Unlike the ordinance in *Lounge Management*, there are no allegations, nor has there been any evidence shown that the Waukesha ordinance is content based or encompasses "expressive activities that do not implicate the secondary effects that the town may legitimately seek to regulate." *Lounge Management*, 580 N.W.2d at 161. The Court of Appeals recognized this fact itself in an earlier challenge to this ordinance by this plaintiff. *City News and Novelty, Inc. v. City of Waukesha*, 170 Wis.2d 14, 25-6, 487 N.W.2d 316 (Wis. App. 1992).

Although content-based regulations restricting First Amendment protected speech certainly are presumed unconstitutional, Wisconsin courts recognize that is not the case when content-neutral restrictions are at issue. *See, Brandmiller v. Arreola*, 199 Wis.2d 528, 544 N.W.2d 894 (1996); *State v. Ruesch*, 214 Wis.2d 548, 571 N.W.2d 898 (Ct.App. 1997) (citing *State v. McManus*, 152 Wis.2d 113, 447 N.W.2d 654 (1989)) in support of its holding that the

party challenging a content-neutral statute must prove beyond a reasonable doubt that there are no possible interpretations of the statute which would be constitutional.

The Petitioner's argument that the City needed to prove that its ordinance is constitutional beyond a reasonable doubt is in direct conflict with *FW/PBS v. Dallas* and its progeny. It does not satisfy the requirement set forth in Rule 10(c) for review by this Court.

III. IN ACCORD WITH U.S. SUPREME COURT DECISIONS, THE LICENSING SCHEME PROVIDES OBJECTIVE STANDARDS OF RENEWAL TO GUIDE THE DECISIONMAKER

The petitioner argues that the licensing ordinance does not contain sufficiently objective standards governing renewal decisions to prevent the exercise of unlawful discretion. It cites *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), in support of this contention. (Petition pp. 11-13).

The fundamental principles enumerated in *City of Lakewood* require a permit or licensing scheme to establish clear guidelines limiting the discretion of the official designated to issue the permit or license to ensure that protected speech is not suppressed. The Wisconsin Court of Appeals applied this well-settled principle of constitutional law in holding that the same pitfalls present in the *Lakewood* case were not present in Waukesha's licensing scheme. (A. 15.) This is only logical, since by the time the government is deciding sanctions, it has already made its determination whether to deny (or in this case not renew)

a license, and has therefore followed clear and discernible standards prescribed by the ordinance as required by *Lakewood* and its progeny.

Arguing that the City does not have discernable standards to guide the decisionmaker, the petitioner claims that the ordinance should have had a range of provisions for the City to choose between mild and severe punishments. (Petition pp. 12-13). This apparently is an attempt to convince the Court to apply the "least restrictive alternative" test. However, that test is not applicable to content-neutral regulations that promote a substantial governmental interest.

> Restrictions on the time, place and manner of protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech . . . less any confusion on this point remain, we reaffirm today that a regulation of time, place and manner of protected speech need not be the least restrictive or least intrusive means.

Ward v. Rock Against Racism, 491 U.S. 781, 797-8 (1989). *See also City News and Novelty v. City of Waukesha*, 170 Wis.2d 14, 25-6, 487 N.W.2d at 320 (Wis. App. 1992). Thus, petitioner ignores well-established law with this claim.

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE PRINCIPLES OF *FW/PBS* IN DETERMINING THAT WAUKESHA'S LICENSING SCHEME CONTAINS THE APPROPRIATE PROCEDURAL SAFEGUARDS

The petitioner makes a facial challenge to Waukesha Municipal Code § 8.195. (Petition pp. 13-17). It is the most

difficult challenge to mount successfully since the challenger must establishment that *no* set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 746 (1987). The U.S. Supreme Court reiterated this standard in *FW/PBS* by stating that, "every application of the statute must create an impermissible risk of suppression of ideas." 493 U.S. at 224.

The Court of Appeals applied the constitutional framework set forth in *FW/PBS* rejecting petitioner's claims that the ordinance contained inadequate time limits and failed to preserve the status quo. (A. 19-22). The court also affirmatively asserted that the ordinance provides prompt judicial determination as stated by the plurality in *FW/PBS*, 493 U.S. at 227, 228. With regard to the latter, the Court of Appeals cited several other decisions such as *Graff v. Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993), *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993), and *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) in support of its interpretation. In addition, the court indicated that the municipality did not have the authority to direct the state court to issue a decision within a specific brief period of time. (A. 22). This is in accord with well-settled principles of the separation of powers doctrine. *Complaint Against Grady*, 118 Wis.2d 762, 348 N.W.2d 559 (1984).

Petitioner asserts that the City could overcome the separation of powers problem by specifying in the ordinance that the status quo be preserved throughout the judicial review process. This argument, which erroneously combines two separate and distinct requirements established by *FW/PBS*, must fail. Preserving the status

quo throughout the judicial review process would do absolutely nothing to hasten review; therefore, it cannot be viewed as having any import whatsoever on a facial challenge of the ordinance and should be disregarded. The Court of Appeals correctly interpreted existing law when it concluded that the City could not dictate the State court's schedule.

In rejecting the petitioner's argument that Waukesha's licensing scheme was the same scenario that was struck down in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), the Wisconsin Court of Appeals applied the constitutional framework established in *FW/PBS* by concluding,

> Unlike *Redner*, however, ch. 68 does not contain contingencies that leave an applicant at the mercy of the licensor's discretion. Perhaps more importantly, once the administrative review appeals board has issued its final determination *see § 68.12(1), Stats.* appellant may obtain *immediate* judicial review. "The chapter 68 Stats' framework for judicial review provides a fixed timetable from the time the municipal authorities initial determination to the date of the administrative review appeals board decision." (A. 18.)

CONCLUSION

Petitioners fail to advance any significant or substantial reason for review. The Court of Appeals properly applied well-settled principles of constitutional law. Review by the Supreme Court will not fulfill any of the

requirements or goals of Rule 10(c). The petition for review should be denied.

Dated this 15th day of May, 2000.

Respectfully submitted,

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In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Wisconsin

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62pp

QUESTION PRESENTED

Is a licensing scheme which acts as a prior restraint required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision?

PARTIES TO THE ACTION BELOW

The parties indicated in the caption are and have been the only parties to this action.

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The unpublished order of the Supreme Court of Wisconsin, entered on January 18, 2000, is reproduced in the Appendix to the Petition for Writ of Certiorari. (A-54.[1]) The decision of the Wisconsin Court of Appeals, entered on October 20, 1999, is published as *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis.2d 93, 604 N.W.2d 870 (Ct. App. 1999). The Court of Appeals' decision is also reproduced in the Appendix to the Petition for Writ of Certiorari. (A-1.)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATUTES AND ORDINANCES

Chapter 68 of the Wisconsin Statutes governs municipal administrative procedure and review of administrative decisions. The provisions of Chapter 68 are reproduced in the Appendix to the Petition for Writ of Certiorari. (A-85.) The City regulates adult entertainment establishments under Waukesha Ordinance § 8.195, also reproduced in the Appendix. (A-95.)

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[1] All references to the Appendix to the Petition for Writ of Certiorari will hereafter be shown as, e.g., A-1.

STATEMENT OF THE CASE

Introduction

This case involves a facial constitutional challenge to a municipal ordinance establishing procedures for the renewal of licenses to engage in constitutionally protected expression. As will be shown, under the Waukesha ordinance, the owners of an ongoing expressive business may timely file their renewal application but then find that their license has expired even before completion of all diligently-pursued mandatory administrative review. Because completion of such administrative review is a prerequisite to judicial review, it is clear that this ordinance, on its face, allows the suppression of expression prior to even the *possibility* of any judicial review, regardless of whether the eventual judicial review is in fact "prompt."

Under such a scenario, the First Amendment inquiry of whether "prompt judicial review" requires a prompt judicial "determination" or, alternatively, merely requires the ability to promptly file a lawsuit, but with no guarantee of its prompt consideration, is beside the point, as an ongoing business required to shut down temporarily could quickly be forced into permanent closure before there is a possibility of even *seeking* judicial review.

Facts

Waukesha Municipal Code ("the Ordinance") § 8.195(2) states: "[N]o adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City . . . ." (A-101.) Petitioner City News & Novelty, Inc. (hereinafter "City News") operated a duly licensed adult bookstore in

Waukesha[2] (A-3), and was required by § 8.195(7) to renew its license annually. (A-104.)

Section 8.195(7)(a) requires that a renewal application must be filed not later than 60 days before the license expires, and under § 8.195(3)(c), the City Clerk is required to notify the license-holder of the approval or denial of the renewal application within 21 days of that filing.[3] (A-102.) Pursuant to § 8.195(4)(a)-2, the license application will be denied if the licensing authority finds that the applicant has committed a single violation of any provision of this ordinance within the prior five years. The ordinance allows the administrative licensing officials to make all factual determinations whether the ordinance has been violated, and does not require proof of any prior judicial convictions.

The ordinance then establishes two alternative routes for administrative appeal of such an order.

Specifically, § 8.195(11) compels the denied applicant to follow all administrative review procedures which are available under city ordinances and state law. (A-109.) As the Wisconsin Court of Appeals held, the "primary method of review" lies under Chapter 68 of the Wisconsin Statutes. (A-28.) This state statute (entitled "Municipal Administrative Procedure") establishes a sequence of administrative review procedures that an applicant must exhaust before seeking judicial review of a municipality's

---

[2] The store sold and rented sexually explicit materials, including magazines and videotapes, and had on-premises booths for viewing videotapes. There is no suggestion or evidence in the record that any of these items were obscene or otherwise undeserving of full First Amendment protection.

[3] The 21-day notification requirement of § 3 of the ordinance is in the section which governs new license applications. The City construes its ordinance as requiring the same notification procedure for renewal applications. (A-17.)

nonrenewal decision. Pursuant to Wisconsin Statutes § 68.13(1) (*see* A-93), an applicant may seek judicial review only of a "final determination" which, as defined in § 68.12, contemplates exhaustion of all of the various administrative appellate remedies otherwise provided in Chapter 68. Those administrative procedures are both cumbersome and time consuming.

First, under § 68.08, an aggrieved individual is given 30 days within which to request review of the initial determination (i.e., the one to be rendered by the City Clerk). The aggrieved party must "state the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed." *Id.*

This requested review of the initial determination may be carried out by the very same entity that *made* the initial determination, or by a different person or group. Section 68.09(2). Under § 68.09(3), the reviewing entity then has 15 additional days within which to complete its review.

In order to exhaust all mandatory administrative review, the denied applicant must next pursue what § 68.10 refers to as an "administrative appeal." (A-90.) Pursuant to § 68.11(1), this "administrative appeal" hearing must begin within 15 days of the notice of appeal. No provision limits the duration of the hearing or prevents its being continued. Section 68.11(2) provides that this administrative appeal may be heard by a variety of candidates, including even an individual appointed by the municipality who may be, *inter alia*, any officer of the governing body who did not participate in making or reviewing the initial determination. (A-92.) Under the Waukesha ordinance, the entirety of administrative appellate review can be conducted exclusively by local members of the City Council.

If the municipality takes advantage of the maximum time limits discussed above, and if the applicant files all relevant appeals on the very same day that the appealed ruling is filed, 51 days will have elapsed before there is any requirement that this administrative hearing begin.

Thereafter, Chapter 68 neither compels the hearing on the administrative appeal to be concluded in a single day, nor does it prevent it from being continued, either repeatedly or indefinitely. Although the statute sets no time limit for completion of the hearing on the administrative appeal, § 68.12(1) requires a final determination within 20 days after the *completion* of *both* the hearing, *and* any post-hearing briefing. The statute imposes no deadline for completion of briefing.

Accordingly, assuming the applicant filed all relevant appeals on the same day that the appealed decision was rendered, assuming further that the hearing on the administrative appeal was started and concluded on a single day and was not continued for any reason, and assuming also that all briefing was completed and submitted on or prior to the hearing date, on the face of the City ordinance and state statutes, the municipality is *still* allowed a *minimum* of 71 days within which to render a final administrative decision on the license renewal application.[4] However, as noted above, a renewal application is deemed timely if filed 60 days before the expiration of the license. Consequently, on its face, the ordinance fails to guarantee completion of administrative review of a timely filed renewal application before the currently-held license will expire.

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[4] Again, the time could *substantially* exceed this 71-day period if the City exerts its unfettered discretion to continue the hearing for as long as it deems necessary, or if the City's attorneys require any considerable time for their briefing.

An alternative method of administrative review is established by § 8.195(3)(d) of the Ordinance, which provides that an applicant who receives an adverse initial determination may seek a hearing before the City Council or its designated committee.[5] This route appears to be a more direct path to judicial review, because it eliminates the middle "request for review" step in the Chapter 68 procedures established by §§ 68.08-09, and the decision issued after such a hearing would probably qualify as a final decision pursuant to § 68.12(2) triggering an applicant's right to judicial review. However, this alternative builds in an open-ended delay. Because the ordinance does not provide any time limit within which the tribunal must rule following such a hearing, the Wisconsin Court of Appeals held this alternative sequence of administrative review facially invalid and severed it from the remainder of the ordinance. (A-24-28.) Since the ruling of the Wisconsin Court of Appeals renders this provision – which the parties did not elect to follow in any event – a nullity, and there has been no appeal from that ruling, it is not considered hereafter in any aspect of petitioner's facial constitutional challenge.

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[5] The City is not *compelled* to follow the administrative procedures set forth by the state statute. Section 68.16 expressly allows municipalities to enact ordinances or resolutions which opt out of the procedures established by Chapter 68 of the Wisconsin statutes. However, as that "opt out" language was construed by the Wisconsin Court of Appeals in *Tee & Bee, Inc. v. City of West Allis*, 214 Wis.2d 194, 571 N.W.2d 438 (Ct. App. 1997), the mere enactment of parallel municipal administrative review provisions (as was done here) does not constitute sufficient evidence of opting out of the state administrative appeal provisions. Rather, the municipality must enact an ordinance or resolution which affirmatively elects to "opt out" of the state procedures of Chapter 68. 214 Wis.2d at 204, 571 N.W.2d at 443.

Although a Chapter 68 review sequence can easily extend beyond the date upon which the license of an applicant who has timely filed for renewal has expired, § 8.195(2) of the Ordinance prohibits operation of any adult-oriented business without a license, and makes no exception for businesses whose licenses have expired while they seek administrative or judicial review of a decision denying renewal.

Finally, the duration of judicial review is itself essentially open-ended. Section 68.13 of the Wisconsin Statutes establishes the relevant judicial review procedures.[6] (A-93.) It provides that an aggrieved party may seek judicial review through a statutory certiorari action. However, it does not include a provision to maintain the status quo during the review process, nor does it impose any effective time limits on the reviewing court for completion of an initial decision on the merits.[7] It does, however, stipulate that before there can be a judicial

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[6] All references in this brief are to the 1995-96 Wisconsin Statutes.

[7] While the City may argue that Wisconsin Supreme Court Rule 70.36(1)(a) supplies a constitutionally adequate guarantee of prompt judicial review, that is not the case. That Rule states that circuit judges must issue decisions in matters consigned to them within 90 days of the time a case is in "final form," meaning that all briefs and other submissions have been filed. On its face, this provision contains a big escape hatch; all a judge needs to do to get another 90 days is to file a one-sentence certification to the chief judge of the district that he or she has been unable to complete a decision within 90 days. These certifications are so common in the Wisconsin circuit courts that the parties are not even sent copies of them.

Moreover, given the lack of any deadline for preparation of necessary transcripts (discussed below) there is no guarantee of any limited period within with such a case should be in "final form" so as to trigger the illusory 90-day review provision.

decision, either a transcript or synopsis of the administrative proceedings must be provided to the court. Wis. Stat. § 68.13(2). Although the statute requires the municipality to supply a transcript at the appellant's expense, it does not impose any time limit upon the municipality for completion and delivery of the transcript. Under the statute, it is also possible that there will be no final judicial determination even after the court has ruled on the certiorari petition. Specifically, the circuit court is authorized to "affirm or reverse the final determination, *or remand to the decision maker for further proceedings* consistent with the court's decision." Section 68.13(1), Wis. Stats. (emphasis added). Those "further proceedings" could add months to the process, during which time the business remains closed.

These relevant *facial* provisions of the ordinance and statutes comprise the legally operative facts of this case. A brief description of how the City actually implemented those procedures in the present case follows, however, simply to illustrate one example of how this scheme has in fact functioned.

In years past, City News had annually renewed its license to operate as an adult business under the provisions of § 8.195 of the Municipal Code of the City of Waukesha. Its most recent license was due to expire on January 25, 1996. (A-7.) On November 15, 1995, City News applied for renewal of its license. (A-72.)

Although the ordinance provides that the City Clerk is to make the initial decision to grant or deny a license, City News' 1995 application was initially considered at a meeting of the Common Council's Ordinance and License Committee on December 18, 1995.[8] The Committee

[8] Record of Administrative Proceedings filed with Circuit Court in certiorari action below.

recommended nonrenewal, and the next day, the Common Council of the City of Waukesha issued a Resolution finding that City News had committed violations of the ordinance, and denied the renewal of its license. (A-82-84.) The violations cited included past municipal court convictions for permitting minors on the premises (some of which were later vacated, A-70), failing to keep one side of each movie-viewing booth totally open to a public lighted aisle, and patrons having engaged in solitary lewd conduct in the booths.[9] (A-82-84.) While court convictions were offered in evidence in the current case, the ordinance on its face and as specifically construed by the Court of Appeals, allows the administrative agencies unfettered discretion to determine whether violations occurred, and does not require them to base such findings on any prior judicial convictions. (A-42.)

The Council's December 19, 1995 resolution informed City News that it had 30 days to request a review by the Council of its own decision.[10] (A-84.) City News then

[9] There was never any suggestion that City News encouraged or condoned minors on the premises or deviant behavior in the movie booths. Indeed, on one occasion it was City News that called the police when an unstable patron exposed himself in the store. Transcript of Board Hearing I (April 2, 1996), 126. The movie booths had been removed by the time of the Board hearing. Testimony of Officer Dennis Angle, Tr., III, 87; Stipulation of counsel, Tr. I, 169-170.

[10] If the Council Resolution of December 19, 1995 can be read as the City Clerk having advised City News in writing of the reasons for the nonrenewal, then City News could have requested, within 10 days, a public hearing before the Council or its designated committee pursuant to § 8.195(3)(d) of the Ordinance. (A-102.) This option, if it existed, was not mentioned in the December 19, 1995 Council Resolution (*see* A-84), which was required by law to inform the applicant of the available avenues and time limits for appeal. *See* Wisc. Stat. § 68.07 (A-89.)

filed a timely Request for Review pursuant to Section 68.08 of the Wisconsin Statutes, dated January 17, 1996. Section 68.09(3) requires that such a review be completed within 15 days. (A-90.) On January 22, 1996, the Waukesha Common Council reviewed its own decision, and on January 23, it issued a Decision on Review affirming its previous nonrenewal decision. (A-72.)

Since City News had not yet been afforded a due process hearing, § 68.10 Wis. Stats. then gave the bookstore 30 days within which to file a compulsory Administrative Appeal from the Decision on Review of the "Initial Determination." (A-90-91.)

On January 25, 1996, City News' existing license expired.[11] (A-72, ¶ 1.)

City News filed a timely Notice of Appeal dated February 15, 1996. Section 68.11(1) of the Wisconsin Statutes then gave Waukesha 15 days within which to convene a hearing. (A-91.) City News waived this time limit. (A-73.)

Section 68.11(2) required the City to provide "an impartial decision maker" who "did not participate in making or reviewing the initial determination" to conduct the hearing. (A-92.) The first hearing session was

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In any event, § 8.195(3)(d) of the Ordinance was declared unconstitutional by the Wisconsin Court of Appeals in this case because its failure to set a deadline for completing the hearing and rendering a ruling created a "risk of indefinite delay." (A-26-27.)

[11] As applied in this case, the City exercised its discretion to *not* enforce its licensing requirement against petitioner while all relevant administrative and judicial review was proceeding. However, under the ordinance, the City has full power to enforce the license requirement immediately upon a license's expiration, should it choose to exercise that power. Since this is a *facial* challenge to the license renewal procedures, the City's gratuitous non-enforcement decision is immaterial.

convened on April 2, 1996, before an Administrative Review Appeals Board (hereinafter "Board"), consisting of the Mayor, an Alderman, and a citizen, pursuant to § 2.11 of the Municipal Code. (A-72-73.) The City Attorney represented the Council and advocated nonrenewal. City News challenged the impartiality of the mayor and the alderman who sat on this three-person Administrative Review Appeals Board, but the Board rejected this challenge, concluding that they were not disqualified under the state statute because neither one had previously voted or participated in the prior Initial Determination, nor in the subsequent Decision On Review. (A-73, ¶ 8.)

Subsequent hearing sessions were convened on April 9, May 7 and May 8, 1996, after which City News and the City Attorney's office submitted briefs, proposed findings of fact and conclusions of law, and responses to each other's submissions. The last brief was submitted by the City Attorney's office on June 7, 1996. While § 68.12(1) required the Board to issue a decision within 20 days of the completion of briefing (A-92), no provision of the municipal code or the state statute fixed a date by which the Board had to conclude the hearing, nor by which post-hearing briefing had to be completed.

On June 28, 1996, the Board affirmed the City's denial of the license. (A-72-81.) Pursuant to § 68.12 of the Wisconsin Statutes, this was a final determination. Since judicial review is available under § 68.13(1) only to a party to a final determination (A-93), this was the first time judicial review was available to City News. City News sought judicial review in state circuit court by means of a statutory certiorari action. There, City News argued that the City's action in failing to renew its license was unlawful because the license renewal procedures were *facially* unconstitutional, regardless of the application of those procedures to City News. (A-56.) In a decision filed April

2, 1997, the circuit court confirmed that City News had properly preserved its constitutional arguments for judicial review, but rejected those arguments on the merits and affirmed the Board's decision. (A-57, 70-71.)

City News appealed the circuit court decision to the Wisconsin Court of Appeals. Two of the numerous challenges City News raised there were that the ordinance failed to require the preservation of the status quo during the administrative and judicial review process (A-19), and that it failed to provide for prompt judicial review. (A-20.) City News also asserted that the ordinance scheme for administrative review of an initial decision (including its incorporation of the administrative review provisions of Chapter 68 of the Wisconsin Statutes) had open-ended time limits.[12]

After receiving briefs, the Court of Appeals certified the appeal to the Wisconsin Supreme Court. (A-44.) By order dated April 21, 1998, the Wisconsin Supreme Court refused certification. (A-53.)

The Court of Appeals then decided the case, issuing its decision on October 20, 1999. (A-1.) As noted above, the court found unconstitutional and severed the administrative hearing procedure established by § 8.195(3)(b) of the Ordinance, but found the remainder of the renewal

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[12] This issue was raised by City News below, including in its brief filed in the Wisconsin Court of Appeals. *See* Principal Brief And Appendix Of Plaintiff-Appellant filed by petitioner in the Wisconsin Court of Appeals on or about July 17, 1997, at pp. 23-24 where, under the heading "Waukesha's Licensing Ordinance Is Unconstitutionally Defective In Regard To Time Limits," petitioner raised the open-ended nature of administrative review under Chapter 68.

provisions (e.g., those found in Chapter 68 of the Wisconsin Statutes) constitutionally unobjectionable.[13] (A-25-26.) Accordingly, it upheld the remainder of the ordinance and in significant part affirmed the decisions of the lower court and the Board. (A-42.)

The Court of Appeals rejected City News' argument that the renewal scheme was unconstitutional for failing to preserve the status quo pending administrative and/or judicial review of a renewal application. In so holding, the court acknowledged that "the licensing scheme in this case starts with a license renewal application deadline 60 days before the license's expiration date." (A-19.) The court, however, concluded that "a decision must be rendered at the very least thirty-nine days before the license is due to lapse." (*Id.*) However, as noted above, the combined ordinance and statutory scheme allows the City *at least* 71 days to render a final administrative decision, and this is assuming that the City does not take advantage of its discretion to continue the hearing on the administrative appeal, and that all briefing in the administrative appeal will be completed by the time of the hearing. In any event, the Court of Appeals perceived no constitutional requirement that the status quo be preserved pending *judicial* review.

After rejecting City News' challenges based upon a failure to preserve the status quo, the Court of Appeals then also rejected an alternative assertion that the ordinance was invalid because it failed to provide prompt judicial review of a non-renewal decision. (A-20-24.) The court concluded that even open-ended judicial review

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[13] The Court's upholding of the Chapter 68 procedures was implicit. City News duly raised this issue with the Court of Appeals (*see*, n. 12, *supra*), but its opinion did not separately discuss this aspect of petitioner's challenge.

satisfies the applicable constitutional requirements so long as the applicant has immediate access to the courts when a renewal is denied. (*Id.*)

City News filed a Petition for Review with the Wisconsin Supreme Court. The Petition was denied on January 18, 2000. (A-54.) On April 18, 2000, City News filed its Petition for Writ of Certiorari with this Court. The Petition was granted on June 19, 2000, limited to the third question presented in the Petition. That question presents, in the context of the foregoing facts, a very narrow issue for resolution by this Court: When a licensing ordinance contains a renewal requirement, must the ordinance include explicit language to prevent injury to a speaker's rights from want of a prompt administrative or judicial decision?

SUMMARY OF THE ARGUMENT

For a variety of reasons, Waukesha's ordinance governing adult business license renewals lacks adequate safeguards to protect a speaker's rights during the extensive time that will elapse while a denied applicant exhausts all required administrative appeals, and, thereafter, diligently pursues judicial review.

First, the ordinance employs an administrative appeals scheme which confers on City officials an indefinite and potentially endless period of time for rendering a final and judicially reviewable administrative determination granting or denying an adult business license renewal. This is because the ordinance adopts certain Wisconsin statutory procedures for exhaustion of administrative remedies, never fashioned for application in time-sensitive First Amendment cases. While the state statute gives municipalities the option of "opting out" of

these open-ended state procedures and substituting their own custom-made administrative review procedures, Waukesha has not availed itself of this opportunity, choosing instead to disregard the requirement this Court identified in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), that there must be a guarantee of a final administrative determination on a permit application for expressive businesses within a specified and brief time period. For this reason alone, the City's license renewal scheme is facially unconstitutional and unenforceable. Moreover, because of the indefiniteness of the time periods for completion of administrative review, the time between the filing of a renewal application and the completion of any *judicial* review is also indefinite, thereby precluding any assertion that the ordinance provides prompt judicial review.

Second, while the ordinance does not specify the *maximum* potential time that City officials could take in rendering a final and judicially reviewable administrative ruling on a renewal application, it does establish a series of time limits which cumulatively allow the City to use up to 71 days to process the application without even relying on *any* of the open-ended features of this scheme. However, the City requires an applicant to file for renewal 60 days before the expiration of the license. Consequently, one can timely file a license renewal application and find that the license has expired before the City has even rendered a final administrative ruling on the renewal application, even if the City has not taken advantage of *any* of the open-ended time periods of its licensing scheme. Because the 71-day administrative review period exceeds the 60-day advance-filing period for renewals, by definition this scheme fails to guarantee a judically-reviewable final administrative decision on a license renewal application within a reasonably "brief" time period.

Third, this Court's decisions, including *FW/PBS, Freedman v. Maryland*, 380 U.S. 51 (1965), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), all make clear that while prompt judicial review is required to ensure the constitutionality of administrative prior restraints which merely *preserve* the status quo, administrative prior restraints may not *alter* the status quo by forcing the cessation of ongoing expressive businesses prior to judicial review. Because the Waukesha renewal scheme fails to provide a stay pending completion of *either* administrative *or* judicial review, it violates the First Amendment for this reason as well.

In short, the failure of Waukesha's adult business licensing scheme either to guarantee a prompt and final administrative ruling on a renewal application, or to preserve the status quo for a preexisting licensed business pending administrative and judicial review, mandates its invalidation under the tests established by this Court's decisions. These decisions preclude the City from arguing that the judicial review provided to an applicant can be considered in any sense "prompt."

ARGUMENT

The primary question before this Court is whether Waukesha's adult business licensing ordinance is facially invalid because it does not provide for a stay of an order denying renewal of a license during the administrative and judicial review process. Because licensing requirements are – by definition – prior restraints[14] (and are in

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[14] *Any* license requirement for expressive activities is, by definition, a "prior restraint" on expression. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 and 131 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969); *Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951). *Cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-226 (1990). This is

fact the archetypal prior restraints which motivated enactment of the First Amendment[15]), this Court has repeatedly held that any licensing scheme for protected First Amendment activity must contain strict procedural safeguards.[16] Although "prior restraints are not unconstitutional *per se* . . . [a]ny system of prior restraint comes to this Court bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 225 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)). *Accord Vance v. Universal Amusement Co.*, 445 U.S. 308, 316, n.13 (1980), and numerous cases therein.

The renewal procedures under Waukesha's adult business license ordinance are remarkably bereft of required constitutional safeguards. The ordinance's constitutional defects include: (1) the failure to ensure a final judicially reviewable administrative ruling on a permit application within a specified and brief time period; (2) the failure to preserve the status quo pending judicial review; and (3) the failure to preserve the status quo

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because until one has obtained the license, one is banned in advance from engaging in the desired expressive activities.

[15] In *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938), this Court recognized that "[t]he struggle for the freedom of the press was *primarily directed* against the power of the licensor." (Emphasis added.)

> [T]he liberty of the press became initially a right to publish *'without* a license what formerly could be published *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guarantee of liberty, the prevention of that restraint was a *leading purpose* in the adoption of the constitutional provision.

303 U.S. at 451-452 (final emphasis added).

[16] *See, e.g., Freedman v. Maryland*, 380 U.S. 51 (1965), and *FW/PBS, Inc. v. City of Dallas, supra*.

pending completion of even compulsory *administrative* review.

Under the permit renewal scheme here challenged, the time periods for completion of mandatory administrative review are open-ended, with no guarantee of a final ruling before the prior license expires. Nor is there any provision automatically staying a non-renewal order pending the completion of *either* the mandatory administrative review *or* any review by a court. As a result, an existing business may well be forced to close before its owner has the opportunity to seek any judicial review, and, indeed, even before the completion of all compulsory administrative review. Such a licensing scheme is patently invalid.

Additionally, this Court's decisions establish beyond doubt that one faced with an unconstitutional licensing scheme may challenge its lack of procedural safeguards on its face, even if the record does not show that the locality abused its discretion in applying its ordinance to the challenger. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 223-225.[17] The familiar theory, of course, is that standing is recognized in such cases in order to protect others not before the court (and ultimately the public) from the unconstitutional impact of such sweeping prior restraints. Consistent with this rule of standing, this Court has held that facially invalid licensing laws affecting First Amendment rights are void and may be ignored with impunity by those wishing to engage in the exercise

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[17] As this Court noted in *FW/PBS*, 493 U.S. at 223-224:

> [W]here a scheme creates a "[r]isk of delay" . . . , such that "every application of the statute create[s] an impermissible risk of suppression of ideas," *Taxpayers for Vincent*, 466 U.S. [789], at 798, n.15 [(1984)], we have permitted parties to bring facial challenges.

of First Amendment rights, as if they had never been enacted. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

I

THE WAUKESHA LICENSE RENEWAL PROVISIONS VIOLATE THE FIRST AMENDMENT BY FAILING TO GUARANTEE THAT THE CITY WILL RENDER A FINAL AND JUDICIALLY REVIEWABLE ADMINISTRATIVE RULING ON A RENEWAL APPLICATION WITHIN A BRIEF AND SPECIFIED TIME PERIOD.

The most obvious of the ordinance's deficiencies with respect to adult business license renewals is its failure to comply with the basic First Amendment requirement which led this Court to invalidate the Dallas adult business licensing scheme in *FW/PBS*. Specifically, the Waukesha ordinance fails to guarantee that there will be a final and judicially reviewable administrative ruling denying renewal within any brief and specified time period. Because the open-ended nature of the administrative time frame necessarily delays the point in time at which judicial review may be initiated, such a flaw is within the scope of the question presented because it causes the time frame for judicial review to be open-ended and indefinite. *See, e.g., Redner v. Dean*, 29 F.3d 1495, 1501-1503 (11th Cir. 1994).

In *FW/PBS*, this Court addressed a Dallas licensing scheme for adult businesses which instructed the chief of police to grant or deny a license within 30 days from the date the application was filed, but further provided that the license could not issue unless various other city inspectors had first inspected and approved the premises. Because the ordinance did not impose time limits for the completion of those inspections, the 30-day ostensible

time limit was deemed illusory and indefinite. Because the time period was indefinite, this Court held the licensing requirement facially invalid.

The same vice infects the Waukesha renewal scheme. As the facts detailed above illustrate, the ordinance compels a denied renewal applicant to exhaust the administrative appeals procedures established by Chapter 68 of the Wisconsin Statutes, and those statutes create an open-ended scheme for obtaining a final administrative determination. Specifically, the indefiniteness of this time period is traceable to the "administrative appeal" mandated by § 68.10 of the Wisconsin Statutes. While Section 68.11(1) mandates that the hearing on this appeal must begin within 15 days of the notice of appeal, no provision limits the duration of the hearing or prevents its being repeatedly or indefinitely continued.

The only relevant time limit, found in § 68.12(1), requires a final determination on the appeal within 20 days after the completion of *both* the hearing *and* all briefing. However, just as the statute does not prohibit repeated or indefinite continuances of the hearing, it likewise imposes no deadline for the completion of briefing. Accordingly, even if the hearing were promptly commenced within the prescribed 15 days from the notice of appeal, and even if the hearing were concluded in a single day and was never continued, the statute imposes no definite requirement for a final ruling because the post-hearing briefs contemplated by the statute need not be submitted within a specified fixed period, and the requirement of a final determination of the appeal is measured, *inter alia*, from the date when all briefing is completed. Consequently, the time periods for completion of administrative review are open-ended and violate the First Amendment principles identified in *FW/PBS*.

Apart from its lack of any *definite* time limits for completion of administrative review, this scheme independently violates the First Amendment principles of *FW/PBS* because it fails to guarantee that a final judicially-reviewable administrative decision will be rendered within a "brief" time period. Wholly apart from the open-ended features of the ordinance's renewal procedures, the fixed time periods alone allow the City a total of 71 days within which to render a final judicially-reviewable administrative determination on a renewal application.

While the meaning of the constitutionally required "brief" period must necessarily vary with the context in which it arises, it is clear that in the present context, 71 days cannot be found constitutionally "brief" where the ordinance provides that a license renewal application will be timely if filed 60 days before the expiration of the license. Whatever else the constitutionally required concept of a "brief" time period means in these cases, it surely must mean that, at an absolute minimum, the time period by which administrative review must be completed must be shorter than the time between the date a license renewal application is due and the date the license expires if renewal is denied.

No doubt, the lack of definite and brief time periods here is the result of a broad state-wide scheme establishing generally applicable administrative review procedures which apply to all municipal administrative rulings, and which were not fashioned with any special time-sensitivity for review of speech-related rulings. However, the City has an easy remedy. Section 68.16 of the Wisconsin Statutes expressly allows municipalities to enact ordinances which opt out of the mandatory state administrative procedures set forth in Chapter 68.

Accordingly, Waukesha has no excuse, in an ordinance specifically aimed at speech activities, for failing to provide the speech-sensitive procedural safeguards which this Court mandated in *FW/PBS*.

Because Waukesha's licensing scheme is facially unconstitutional for failure to guarantee a final, judicially reviewable administrative ruling on a license renewal within a specified and brief time period, the ordinance should be invalidated and the Court need not even reach the separate constitutional problem addressed in Point II of this brief. However, should the Court elect to reach it, the constitutional problem identified therein is no less compelling.

II

THE WAUKESHA ORDINANCE'S PROVISIONS FOR NONRENEWAL OF AN ADULT ENTERTAINMENT BUSINESS LICENSE ARE ALSO FACIALLY UNCONSTITUTIONAL BECAUSE THEY FAIL TO PROVIDE A GUARANTEED STAY IF EITHER THE ADMINISTRATIVE OR JUDICIAL REVIEW PROCEDURES EXTEND BEYOND THE LICENSE EXPIRATION DATE.

In numerous prior decisions, this Court has held that administrative prior restraints on expression which occur prior to judicial review are *only* permissible if they *preserve*, not *alter*, the status quo, and only if they guarantee a prompt judicial determination in review of any administrative restraint which *preserves* the status quo. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 227-228, 239. On grounds of both precedent and policy, that clear rule should prevail in the present case.

A. This Court's Decisions Make Clear That, In The Absence Of Some Great Or Immediate Threat To The Public Health Or Safety, Government May Not Interfere With Ongoing Expression Absent Prior Judicial Approval.

Two consistent threads run through this Court's prior restraint cases with respect to the requirement of effective judicial intervention in a prior restraint scheme. Where the administrative restraint is one which *preserves* the status quo (such as the film-licensing scheme in *Freedman*), this Court's decisions have made clear that one of the prerequisites of such a scheme is that it ensure prompt judicial review.[18] This case, however, involves the

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[18] *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965), where this Court said:

> Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser v. Randall*, 357 U.S. 513, 526, "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination

other thread of this Court's prior restraint cases, where the administrative restraint *alters* the status quo by causing the cessation of *ongoing* speech activities.

Although this Court has been careful not to make too much of this distinction, lest it minimize the risks of suppressing *prospective* speech activity, in *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 771-772 (1988), the majority recognized that in cases of *ongoing* expression, "there is exceptional force to the argument that a permit delayed is a permit denied." In keeping with this reasoning, the Court's decisions in this area clearly establish that administrative prior restraints may not ordinarily alter the status quo before there has been judicial approval of the restraint.

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suffices to impose a valid final restraint. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519 (1962). To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), for example, this Court struck down an informal scheme of prior restraint by which booksellers were persuaded to pull off their shelves any books mentioned in a prosecutorial "blacklist." The Court characterized this as an informal system of prior restraint and stated that only a *judicial* determination would suffice for interfering with ongoing speech activity:

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. We have tolerated such a system *only where it operated under judicial superintendence* and assured an almost immediate judicial determination of the validity of the restraint.

372 U.S. at 70-71 (emphasis added, citations and footnotes omitted).

Again, in *Southeastern Promotions, Ltd. v. Conrad*, the Court stated:

> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint ***prior to judicial review can be imposed*** only for a specified brief period and ***only for the purpose of preserving the status quo***. Third, a prompt final judicial determination must be assured.

420 U.S. at 560 (emphasis added).

As this Court has clearly stated in *Southern Promotions* that "any restraint prior to judicial review can be imposed . . . only for the purpose of preserving the status quo," this rule should be dispositive of the present case. Here, Waukesha has an ordinance scheme which authorizes the City to impose a restraint prior to judicial review which *alters* the status quo by forcing an ongoing business to close.

Further support for this position comes from this Court's decisions in both *Freedman v. Maryland* and *FW/PBS*. While both of these cases analyzed prior restraints which *preserved* the status quo, they both clearly discussed the constitutional issues which apply here. As Justice O'Connor stated for the three-Justice plurality in *FW/PBS*:

> In *Freedman*, we determined that the following . . . procedural safeguard . . . [*inter alia*, was] necessary to ensure expeditious decision making by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed *only* for a specified period *during which the status quo must be maintained*.

493 U.S. at 227 (emphasis added). Justice O'Connor then adopted this portion of the *Freedman* test for the analysis of the adult business license ordinance in *FW/PBS* (as did Justice Brennan in his concurring opinion for himself and two other Justices[19]) by stating that it was "essential" that "the licensor must make the decision whether to issue the license within a specified and reasonable time period *during which the status quo is maintained*." *Id.* (emphasis added).

Here, the ordinance does not provide for maintaining the status quo while the licensor makes a renewal decision. Rather, this ordinance, on its face, empowers the City to extend the mandatory administrative appeal process well beyond the expiration date of the license for which a renewal application is timely filed. Consequently, this ordinance allows city administrative officials to change the status quo by closing a pre-existing business prior to judicial review. That is forbidden by *FW/PBS*, *Freedman* and *Southeastern Promotions*.

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[19] *See* 493 U.S. at 239.

B. As A Matter Of Policy, It Is Critical That The Requirement Of Prior Judicial Review Be Maintained As A Protection Against Unconstitutional Administrative Prior Restraints Of Ongoing Speech Activities.

Under the Waukesha ordinance, all phases of the mandatory administrative appellate review may be conducted exclusively by City Council members who have no necessary legal training and, certainly, no training in constitutional law. Consequently, *judicial* intervention is critical to ensure that all requisite constitutional safeguards are employed before the City unilaterally terminates ongoing expressive activities. Such review serves a variety of important constitutional functions under the First Amendment, including (1) ensuring that any closure sanction is not broader than is constitutionally tolerable based upon the nature of the alleged violation; (2) ensuring that only offenses committed by constitutionally responsible individuals can force the closure of an expressive business; (3) protecting against the dangers of bias where those who sit as judge and jury in nonrenewal rulings may be the very politicians who have the most political interest in closing such businesses; and (4) insuring at least one level of judicial scrutiny, given that the ordinance allows the relevant violations to be proven without any showing of prior judicial convictions.

1. Judicial review prior to governmental interference with ongoing expression is necessary to ensure that a nonrenewal sanction is not overbroad.

Prior judicial review is constitutionally indispensable for a licensing renewal/revocation scheme such as Waukesha's, in order to ensure that an administrative sanction for an ordinance violation does not sweep unconstitutionally broadly. Under the Waukesha scheme,

every violation of which an operator has actual or constructive knowledge is deemed of equal severity and absolutely precludes the owner from reapplying for a license for a full year. § 8.195(8)(a)-(d).

Many adult business licensing ordinances around the country authorize non-renewal, revocation or suspension for *any* violation of the municipal code or any applicable law. This could be for something as minor as shrubbery which slightly exceeds the allowable height for such shrubbery. It could also be for some minor and easily fixable violation of a building or electrical code. These ordinances generally, and Waukesha's in particular, do not require any prior notice or warning to the applicant so they may cure any potential problem. The only notice required under the Waukesha ordinance is that provided in § 8.195(8)(b), which simply indicates that the licensee shall be given 10 days notice before the holding of any public hearing to revoke his license. The ordinance provides for no notice allowing the cited business an opportunity to cure any easily remediable violations.

While the ordinance authorizes, in the midst of a license term, a short-term suspension for a first-time violation by a worker without the owner's actual or constructive knowledge, this flexibility disappears at renewal time, when nonrenewal for any violation is mandatory.[20] Moreover, the great potential for mischief in this type of scheme is illustrated by § 8.195(8)(a)-2, which compels revocation if the operator "violates any provision of this section *or any rules or regulation adopted by the Council*

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[20] Under § 8.195(4)(a)-2, the sanction of non-renewal appears mandatory and non-discretionary upon proof of but a single violation. Even in the revocation context, proof of one violation of *any* type by the owner compels a one-year non-discretionary revocation of the owner's license. (*See* § 8.195(8)(a), stating that "[t]he Council *shall* revoke a license or permit for any of the following reasons." Emphasis added.)

pursuant to this section." There is no limit to the potential rules or regulations which the Council may adopt pursuant to this code section; consequently, the potential for abuse on the face of the ordinance is significant. As a result, judicial intervention in such a scheme is mandatory to assure that any sanction for a violation is constitutionally tolerable, particularly given that the ordinance *requires* revocation for a *first* offense by an operator (or a second offense by any employee of the operator under circumstance where the owner had no knowledge of the employee's violations and could not have known of them even with the exercise of due diligence).[21]

In short, this ordinance confers unlimited power upon the City Council to enact rules establishing the most picayune and technical violations which would then justify (and indeed compel) a one-year license revocation. *See* § 8.195(8)(d). Such a scheme mandates judicial intervention in order to ensure that the remedy imposed is constitutionally sustainable. This is particularly important in an area where a licensing requirement is imposed exclusively upon a class of businesses defined by the content of their expression, and the potential for extremely biased and politically-motivated application is patent.

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[21] Surprising as it may seem, the number of offenses required for revocation is arguably greater than that required for non-renewal. Assuming the initial licensing requirements apply in a *renewal* context, the ordinance compels non-renewal upon proof of only *one* violation. *See* § 8.195(4)(a)-2. Moreover, in the context of renewal decisions, *any* violation by an employee automatically is attributable to the owner (and therefore warrants revocation) regardless of the scienter of the owner. *See* § 8.195(10)(b). Also, the finding of a violation in the *non-renewal* context disables an applicant from re-licensure for *five* years (*see* § 8.195(4)(a)-2), while the same violation found in a *revocation* proceeding only prohibits re-licensure for *one* year. *See* § 8.195(8)(d).

2. Judicial review is also necessary to ascertain that a constitutionally responsible individual has committed an offense justifying nonrenewal of a license to engage in expression.

Judicial intervention is also indispensable to an administrative scheme designed to silence ongoing expression because of the danger that the City will base a revocation or non-renewal upon offenses assertedly committed by persons who lack the owner's motivation to fight the charges against them.

Specifically, as this Court is surely aware, not every officer tells the truth in every case. Occasionally, and particularly where strong political pressure is brought to bear, false charges can be brought against customers or employees of adult entertainment businesses where the prosecuting official has reason to believe that the charged individual will simply enter a guilty plea rather than suffer the embarrassment or expense of a trial, and the threat of a much greater sanction if they were to contest the charges.

For example, suppose a married man, who knows his wife would disapprove his watching of such films at home, goes to an adult bookstore and watches a sexually explicit film in a video viewing booth. If this customer is under surveillance by an unscrupulous vice officer assigned the task of finding lewd conduct violations in an adult bookstore, it would not be at all surprising to find fabricated charges brought against the individual based upon a factual dispute over the precise conduct in which the customer was engaged. However, it would be the extremely rare case where such a customer would fight the charges, due to the extreme embarrassment and expense of a public trial. This is particularly the case where, as would be likely in such a setting, the prosecutors would promise a suspended sentence or some other

relatively painless resolution if the individual simply entered a guilty plea. Thus armed with a conviction, motivated prosecutors can then bring such information to the local mayor or police chief in a license revocation or non-renewal context and, without any judicial intervention whatsoever, the owner can find his business closed with no due process opportunity to contest the validity of the charges against him.

Likewise, it is common in many areas for prosecutors to bring factually questionable prostitution or lewd conduct charges against the dancers at an adult entertainment business under circumstances where the dancers may have good faith statutory or constitutional defenses to the charges. However, because these prosecutors are motivated to obtain convictions to use against the owner, they routinely offer plea bargains to the dancers which let them off with suspended sentences and/or summary probation, while threatening the fullest sanctions available under the law if they contest the charges. Invariably, the dancers enter guilty pleas and waive their rights to assert good faith statutory or constitutional defenses to the charges against them. The dedicated or zealous prosecutor then simply gathers up such convictions and presents them to the local mayor in a revocation or renewal proceeding. The City then swiftly obtains the immediate revocation or nonrenewal of the owner's license, all without any opportunity for the owner to contest the charges. This is particularly the case given that conflict of interest laws absolutely prohibit the owner's attorneys from controlling litigational decisions involving the defense of charges against the dancers.

Accordingly, as a matter of policy, it is critical for this reason as well that judicial intervention precede any termination of an ongoing expressive business.

3. Because of the dangers of bias where municipal executives sit as judge and jury in determining the rights of those engaged in expression to which they are frequently hostile, judicial review is constitutionally critical before ongoing speech may be stifled.

As noted above, innumerable decisions of this Court have stressed the necessity of impartial judicial review where fundamental rights are at stake. Underlying all these decisions is an overarching policy consideration, recognizing the unfortunate but undeniable reality that local officials and enforcement officers are institutionally more concerned with enforcement than with protecting constitutional rights. Nowhere is this truer than in cases involving expression protected by the First Amendment, but to which for political or other ideological reasons, local officials are often demonstrably hostile.

In its many decisions upholding the right of access to the federal courts, this Court has stressed the need for an impartial magistrate in the not-uncommon instances in which "by reason of prejudice, passion, neglect, intolerance or otherwise, . . . the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

Where First Amendment interests are at stake – and particularly where as here a licensing law threatens the removal of presumptively protected materials from circulation – this Court has always held that procedural protections such as close judicial supervision "must be applied with 'scrupulous exactitude.' " *Zurcher v. Stanford Daily*, 436 U.S. 537, 564 (1978) (*quoting Stanford v. Texas*, 379 U.S. 476, 485 (1965)). For the past four decades, this Court has upheld as one of the most central of those protections that "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity

to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *see also Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

This Court is no stranger to instances of local officials who have used permitting or licensing laws to censor speech they disfavored. *See, e.g., Walker v. City of Birmingham*, 388 U.S. 307, 317-339 (1967), as discussed in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157-158 (1969). More recently in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (concurring opinion), Justice O'Connor recognized the potential for a city to "use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books." The ever-present threat of the censorial abuse of a law allowing officials to close an expressive business requires that judicial review precede any such closure.

Many of this Court's decisions in cases involving alleged obscenity have turned on this point, the Court emphasizing time after time that materials may not be suppressed at the discretion of the often zealous enforcement officer. Rather, a judicial officer must first have an opportunity to "focus searchingly on the question of obscenity." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968); *Roaden v. Kentucky*, 413 U.S. 496, 502 (1973). This rule is far from idiosyncratic to the doctrine of obscenity, but rather represents the broader principle that speech may not be stifled prior to a neutral judicial determination.

One of the most instructive of these decisions insisting upon supervision by an impartial magistrate is *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-327 (1979), in which this Court borrowed heavily from its general Fourth Amendment jurisprudence in holding that a town justice who joined a zealous search party in an obscenity raid "did not manifest that neutrality and detachment

demanded of a judicial officer when presented with a warrant application. . . . [H]e was not acting as a judicial officer but as an adjunct law enforcement officer."

"We have repeatedly said that a warrant authorized by a neutral and detached judicial officer is 'a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." ' " *Id.* at 326 (*quoting United States v. Chadwick*, 433 U.S. 1, 9 (1977), and *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). Again, this Court's concern focused on the relatively neutral institutional role of magistrates, compared to that of a law enforcement official charged exclusively with "ferreting out crime."

The same contrast exists between the neutral role of a magistrate and that of City Council members, who (institutionally) are well known for unabashedly political opposition to adult businesses, disregarding all constitutional protections. To empower such individuals to close expressive businesses prior to *de novo* judicial review is anathema to the First Amendment, and underscores the cornerstone of this Court's existing prior restraint doctrine, i.e., that prior restraints which alter the status quo must be preceded by *judicial* intervention.

This Court again articulated this fundamental policy concern in *Forsyth County v. National Movement*, 505 U.S. 123 (1992), facially invalidating an ordinance granting county officials discretion in assessing, or waiving, a parade permit fee based on the official's estimation of the potential expenses, including those for "maintenance of public order." Of the policy behind constitutional safeguards such as requiring that a speech-licensing authority be bound by "narrow, objective and definite standards," this Court said:

> The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion" . . . by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted.

505 U.S. at 131 (citation omitted).

As will be discussed in more detail below, this reasoning applies with particular force in the present context of licensing authorities who must appraise facts, exercise judgment, and form opinions which decide the fate of an expressive business. In contrast to the obscenity context, under a licensing scheme not just one or a few expressive works are at stake, but rather an entire ongoing expressive business offering the public innumerable works. For this reason, this Court has always treated speech-licensing laws as posing enormous dangers of censorship.

Thus, even where local licensing officials may pin their decision to close an expressive business on "objective" criteria, judicial supervision remains crucial in order to safeguard against censorship by hostile or biased local officials (and particularly, as here, *political* officials). As the licensing officials who pass on a license renewal application, the Waukesha City Council will always be involved in the "appraisal of facts, the exercise of judgment, and the formation of an opinion." At the very least, they will have to assess the credibility of testimony when one of their own subordinates, e.g., a city police officer or inspector, alleges violations justifying nonrenewal, for example.

Experience teaches that, given their institutional roles as enforcers of municipal policy and as elected officials subject to the winds of political pressures, local administrators are often more prone to censor than to protect First Amendment rights. For all these reasons, this Court's longstanding requirement that an impartial magistrate intervene before expression is stifled, has its strongest justification where frequently hostile local officials

exercise life-and-death discretion over the fate of expressive businesses.

4. Judicial review is also required because, on its face, this ordinance does not require that any of the relevant violations be proven by prior judicial convictions.

Another aspect of the Waukesha ordinance which compels judicial intervention before an administrative order is allowed to terminate ongoing expression, is the fact that the administrative agency is not engaged in the mere ministerial task of determining whether there has been a court conviction of a constitutionally responsible person for an offense that warrants revocation under the ordinance. Instead, city executives, who are often politically motivated to be quite hostile to adult businesses, sit in administrative judgment and make *their own* factual determinations whether various violations may have occurred.[22] (A-42.)

The absence of a requirement for proof of prior judicial convictions exacerbates the danger of disguised censorship which was noted in *Forsyth County*.[23]

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[22] Because City News challenges this nonrenewal scheme on its face, it is immaterial that in the present application of this scheme, the City happened to have relied largely on judicial convictions. Because the ordinance does not *require* that all violations be proven by prior judicial convictions, no argument can be made in defense of the ordinance that it limits the grounds for revocation to those proven by prior convictions.

[23] Due to its particular relevance, the *entirety* of the relevant language from *Forsyth County* is set forth below:

> Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view. . . . To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." [Citations omitted.] The reasoning is simple: *if the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion,"* . . . by the licensing authority, "the dangers of censorship and of abridgement of our precious First Amendment freedoms is too great" to be permitted.

505 U.S. at 130-131 (emphasis added, citations omitted).

The Ordinance's revocation and renewal criteria provide more than ample opportunities for the appraisal of facts, exercise of judgment, and formation of an opinion by the City executives who make renewal decisions. For example, § 8.195(10)(c) prohibits employees from allowing any minor "to loiter *around* . . . an adult oriented establishment," regardless of whether they actually enter the premises. Whether a minor will be deemed to have loitered "around" an adult oriented establishment will involve appraisal of facts, the exercise of judgment, and the formation of an opinion.[24] The same is also obviously true with respect to the requirement of § 8.195(10)(d), which allows revocation or non-renewal if the City concludes that the premises are not maintained "in a clean and sanitary manner."[25]

[24] Little imagination is required to envision enforcement officials spying a group of teenagers loitering on a nearby corner, and charging the bookstore with a violation on this basis. Reviewing city officials who may be inveterately hostile to the bookstore's existence will not view such charges with the objective eye of a detached magistrate.

[25] Even assuming that this provision does not confer "standardless discretion" on the licensing authority, *cf. Forsyth*

Less obvious, but no less relevant, are each of the more objective revocation criteria. While the criteria themselves may be objective, whether they have been met requires the trier of fact to evaluate the credibility of witnesses. This in itself involves the exercise of judgment, the appraisal of facts, and the formation of an opinion. Moreover, in the administrative context, the ordinance does not provide any tools of discovery by which the licensee can challenge the credibility of the witnesses against him or her.

5. Judicial review is essential in the nonrenewal context because of the need to determine constitutional questions.

Even where there are not significant disputes about objective or subjective facts, challenges to licensing decisions will often raise issues that courts are uniquely qualified to resolve. For example, in this case City News objected, on statutory and due process grounds, to Mayor Carol Opel sitting as chair of the Administrative Review Board after she had presided at two Council meetings where nonrenewal votes had been successful, and had necessarily exercised her authority to decide not to veto the Council's resolutions. (A-29-31.) Apart from the inherent difficulty in asking city politicians to declare city procedures constitutionally inadequate, due process concerns like this which arise in the administrative process are simply going to be beyond the ken of the lay officials handling the case at that point.

County, it is certainly susceptible to subjective interpretations. The inspector may subject an adult bookstore to a "white glove" standard to which no other retail business would be held. *Cf. City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 451-452 (1983) (facially invalidating for vagueness, a provision of an ordinance regulating abortions, requiring that fetal remains be disposed of in a "humane and sanitary" manner.)

Finally, the likelihood of constitutional challenges to an ordinance's standards for nonrenewal requires preservation of the status quo pending a judicial disposition of a nonrenewal decision. Such challenges simply cannot be asserted in a meaningful way prior to judicial review, yet they may provide a complete defense to a revocation or nonrenewal accusation. For example, this Court should not read the record of this case as a history of concessions of violations on the part of City News, but as a history of strategic choices. City News does not concede that *any* of the Ordinance provisions that were employed to nonrenew its license are constitutionally valid. It chose to rely on other arguments, but in future cases applicants for renewal will challenge the validity of issuance and renewal standards like the disability provisions the petitioners lacked standing to challenge in *FW/PBS*. They will argue that some other punishment for violations may be permissible, but that cutting off the right of future speech based on past abuses is not, *Vance v. Universal Amusement Co.* 445 U.S. 308 (1980); *Near v. Minnesota*, 283 U.S. 697, 713 (1931). They will argue that renewal standards are unconstitutionally vague. *See, e.g., East Brook Books, Inc., v. City of Memphis*, 48 F.3d 200, 227 (6th Cir. 1995), *cert. denied*, 516 U.S. 909. These are future cases, but their obvious imminence underscores the essential necessity of judicial review prior to any curtailment of ongoing speech.

In Wisconsin, as the circuit court below noted, an applicant does not encounter a body that has the jurisdiction, much less the legal acumen, to declare legislation unconstitutional until his or her case reaches circuit court. *See* A-56-57, *citing Kmiec v. Town of Spider Lake*, 60 Wis.2d 640, 645 (1973). If the only reason a nonrenewal decision violates the law is that the ordinance provision on which it is based is unconstitutional, the administrative process is worse than useless, because it forces the denied applicant to sink valuable time and energy into a

pointless effort, and works a postponement of the only review that can provide relief, judicial review. Yet, the consequences of the administrative determination are the outright closure of an ongoing expressive business prior to any possible judicial review.

Such consequences are far more devastating in the renewal/revocation/suspension context than in the context of an initial permit denial, because once an ongoing business is forced to close, economic factors will usually preclude its reopening down the road after the eventual completion of judicial review, should the administrative decision be reversed. Once such a business closes, it is likely to lose most, if not all, of its employees. Also, a closed business typically cannot make mortgage or lease payments. The potential long-term consequences of an administrative nonrenewal are simply too great, absent the most compelling circumstances, to permit such an interference with the status quo without a requirement of prior judicial involvement.

C. Numerous Protections Are Available To The City If It Is Required To Provide A Stay Pending Administrative And Judicial Review Of Any Non-Renewal/ Suspension/Revocation Decision.

As demonstrated below, City News is not advocating an absolutist position, nor is it advocating a position which leaves municipalities without ample options for dealing with those businesses which are routinely or flagrantly violating applicable laws.

1. The City may provide for temporary administrative closure where there is a great and immediate threat to the public health or safety.

One exception to the otherwise mandatory constitutional rule that judicial review should precede administrative closure of an ongoing business, is that prompt

judicial review could constitutionally occur *after* implementation of a temporary administrative closure order if such a closure order were pursuant to generally applicable laws and if there were a subsequent judicial determination that unilateral administrative closure was necessary in order to prevent immediate and great injury to the public health or safety.

For example, during the Northridge earthquake, the Los Angeles Department of Building and Safety "red-tagged" a large number of businesses which were deemed unsafe to continue operating, at least without critical repairs. This procedure mandated their immediate closure until necessary repairs were completed. There was obviously no time for prior judicial review in that circumstance. The applicable constitutional rule here would not preclude such non-judicial restraints merely because, e.g., one of the many red-tagged businesses may be one engaged in expression. However, even in that circumstance, subsequent judicial review must be available to ensure that municipal officials do not improperly use a generally applicable threat to health and safety as a pretext for suppressing unwanted expression.

2. For other types of violations, e.g., lewd conduct violations, if the City perceives a serious ongoing situation that requires immediate action, the City may ask a court to issue a TRO in a nuisance abatement action.

Neither do the applicable First Amendment rules impair the City's ability to effectively deal with those adult businesses which fail to respond to an initial notice of violation. If there is an adult business which, after notice, repeatedly and significantly violates applicable criminal laws or local ordinances, then a municipality may fully protect its interests by filing a public nuisance action similar to the one approved by this Court in *Arcara*

v. Cloud Books, Inc., 478 U.S. 697 (1986), and seek immediate issuance of a temporary restraining order if the circumstances warrant such relief.

Such an option would not interfere in any way with the constitutional principle that *administrative* prior restraints which terminate *ongoing* expression are impermissible, absent prior review and *de novo*[26] judicial approval.

D. If This Court Elects To Determine The Duration Of The Stay Which Is Constitutionally Required, Both Precedent And Policy Dictate That The Stay Should Remain In Effect Until There Has Been A Prompt Decision On The Merits By The Initial Court Reviewing The Matter.

Because the Waukesha ordinance fails to provide an automatic stay to preserve the status quo pending judicial review, and even pending completion of *administrative* review, it is a facially unconstitutional prior restraint. Since the ordinance gives the City the power to close an existing business before, and conceivably long before, there is even the *possibility* of access to the courts, such a scheme simply does not provide prompt judicial review, regardless of whether prompt judicial review is considered merely prompt access to the courts or a prompt judicial determination on the merits. Because this ordinance fails to provide a stay preserving the status quo pending *any* type of judicial review, it should be invalidated on that basis and the Court need not address the separate question of whether some other ordinance, not

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[26] This Court has recognized that where First Amendment rights are potentially affected, all relevant fact finding by a reviewing court must be *de novo*. *See Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 508, n.27 (1984); *Hurley v. Irish-American Gay, Lesbian And Bisexual Group of Boston*, 515 U.S. 557, 567-568 (1995); *cf. Speiser v. Randall*, 357 U.S. 513, 521 (1958).

presently before the Court, would be constitutional if it provided a stay only until the completion of administrative review but not pending a judicial determination. However, should this Court nonetheless elect to reach that issue, it is clear, both as a matter of precedent and policy, that the appropriate stay should preserve the status quo until there has been an on-the-merits judicial determination by the initial court reviewing the administrative order.

1. This Court's prior decisions compel the conclusion that the duration of any stay must preserve the status quo pending resolution of the merits by the initial reviewing court.

As noted in Point I-A herein, this Court's prior decisions have distinguished between administrative prior restraints which *preserve* the status quo and those which alter it by forcing the termination of pre-existing speech activities. As this Court stated in *Southeastern Promotions*, "any restraint prior to judicial review can be imposed . . . only for the purpose of preserving the status quo." 420 U.S. at 560. The Court's articulations of this constitutional principle in *FW/PBS* and *Freedman* were to the same effect.

If, as this Court has repeatedly stated, administrative prior restraints which take place prior to judicial review can *only* be imposed for the purpose of *preserving* the status quo, it necessarily follows that any scheme which imposes a restraint prior to judicial review which *changes* the status quo (e.g., by forcing the closure of a pre-existing business) is impermissible.

Accordingly, regardless of the appropriate meaning given the term "prompt judicial review" in the context of a scheme for the licensing of a *new* business, in the context of a renewal, suspension or revocation scheme, the status quo must unquestionably be preserved until

there has in fact been an on-the-merits determination by at least the first court to consider the matter.[27] Consequently, it should be immaterial in this context whether any judicial review is "prompt," because a stay should be in effect protecting the applicant throughout the entire period until a judicial decision has been rendered on the merits.

While some may suggest that the stay should expire at the end of the *administrative* appellate process (rather than at the time the court issues its own determination), that argument is entirely inconsistent with this Court's decisions: "[A]ny restraint prior to judicial review can be imposed . . . only for the purpose of preserving the status quo." *Southeastern Promotions*, 420 U.S. at 550. There can *be* no judicial review until a court has in fact reviewed the administrative order. Accordingly, a valid ordinance must mandate a stay until the administrative order is reviewed by a court, thus preserving the status quo.

2. Policy considerations also compel preservation of the status quo pending an initial judicial determination on the merits, particularly where, as here, the administrative rulings under review are those rendered by elected municipal politicians who are typically anything but neutral administrative fact finders, and who lack both the experience and authority to consider the constitutional ramifications of their actions.

Given the facts that the Waukesha scheme allows members of the City Council to participate in both levels

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[27] City News does not suggest that prompt judicial review requires preservation of the status quo pending *appellate* judicial review, nor do any of this Court's cases suggest such a requirement.

of administrative review, and that city councils, for political reasons, are often quite hostile towards adult entertainment businesses, the rule suggested here is critical. Otherwise, the requisite constitutional protections for speech would be obliterated if city councils could simply issue orders forcing the termination of existing expression before any neutral judicial officer has had an opportunity to review their determinations.

For each of the five separate policy reasons given in Point II-B above, any stay must preserve the status quo until there has been an independent *judicial determination*. Also, as noted above, the potential harm from politically-motivated licensing decisions prior to judicial review is even greater in the context of a *renewal* scheme than that of a *new* business seeking its first license. Moreover, the longer any delay, the greater chance that the effect of any erroneous interim closure order will render final relief moot because the business will not be able to survive. As stated in *Freedman v. Maryland*: "[I]f it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." 380 U.S. at 58. While this caveat from *Freedman* is unquestionably true in the context of one seeking an initial license to engage in expression,[28] it is *particularly*

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[28] The promptness of judicial review for one seeking to establish a *new* adult business can be critical to the ability of such a business ultimately to open. Often, an applicant for a new adult business license will have only an option of limited duration on the property in question. If judicial relief takes too long, the option will expire and the applicant cannot benefit even if the court ultimately reverses the licensing decision.

Likewise, whenever substantial funding is required in connection with the establishment of a new adult entertainment business, e.g., a large scale nightclub business, the longer it takes for judicial review, the more likely that a variety of

true in the context of an existing business whose speech has been silenced by the revocation or non-renewal of a license. The likelihood that the censor's determination may in practice be final is greatly heightened by the economic costs of orders closing already-existing and ongoing businesses.[29]

Consequently, numerous compelling reasons dictate that a constitutional ordinance must provide for a stay to remain in effect until a court has actually reviewed the challenged administrative ruling.

This Court granted certiorari on the question of whether "a licensing scheme which acts as a prior

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economic factors will lead to the abandonment of the project before any ruling is rendered.

[29] The likelihood of injury to be suffered by the non-renewal of an ongoing business' license is even *greater* under an ordinance scheme such as this one, because, on its face, it guarantees the City's ability to administratively close a business *well in advance of the applicant's ability to exhaust all compulsory administrative remedies*. The *minimum* time which the City may take in rendering a final judicially reviewable administrative ruling is 71 days. However, because of the open-ended nature of the time periods for submitting briefing and concluding a hearing in the third level of administrative determinations, the ordinance in fact gives the City the power to impose far longer delays before completion of administrative review. Beyond this, some reasonable period must also be factored in for the preparation of appeals by the denied applicant, as well as the time which it takes for the applicant to receive notice of prior adverse administrative rulings.

In short, the City has the power under this ordinance scheme to ensure that any ongoing business will be closed *long* before there is even the possibility of seeking relief from a court. In the case of ongoing businesses, the exercise of such power will likely be fatal to the speech enterprise, regardless of whether a reversal might ultimately occur at the conclusion of an equally indefinite period for judicial review.

restraint [is] required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision." The wrong way to answer this question is to hold that an ordinance can always ensure against such injury *either* by staying the injurious effect of an administrative decision pending a judicial decision *or* by guaranteeing speedy judicial proceedings. As demonstrated above, the right to meaningful judicial review must mean more than judicial proceedings that simply terminate quickly after they begin if the rights of renewal applicants are to be protected from potential administrative censorship. *Without* a stay, even the swiftest judicial decisionmaking fails to prevent injury to the rights of a business that may well have to close before it can even get to court. *With* a guaranteed stay throughout the first level of judicial review, a renewal applicant suffers no injury even if court review is not very prompt, and the City's inability to control the pace of litigation in the circuit court, which the court below found determinative, ceases to be a concern.

In contrast, the presence of a stay *only* through the *initiation* of judicial review proceedings, is totally ineffective to prevent the dangers of an administrative prior restraint which remains in effect during the pendency of potentially lengthy judicial proceedings of indefinite duration.

Although arising in the unrelated context of a prior restraint on *new* business license applicants, the following discussion from *Baby Tam & Co., Inc. v. City of Las Vegas* (*Baby Tam I*), 154 F.3d 1097 (9th Cir. 1998), illustrates the force of the argument, in *all* contexts, that there is no constitutional utility to a rule which merely insures prompt judicial *access*, but not a prompt judicial *determination*:

> We reject the view of the Fifth and Seventh Circuits that mere access to judicial review is

sufficient. As the Seventh Circuit acknowledged in *Graff*, "[a] person always has a judicial forum when his speech is allegedly infringed." *Graff*, 9 F.3d at 1324. Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.

The phrase "judicial review" compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. As [a] legendary major league umpire . . . once said to an inquisitive catcher: "It ain't nothin' till I call it." This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'.

154 F.3d at 1101-1102.

While the meaning of the term "prompt judicial review" in the context of a licensing scheme which *preserves* the status quo (such as was involved in *Baby Tam*) is not presently before this Court,[30] the logic of this

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[30] This case does not present the Court with the question of the meaning of the term "prompt judicial review" as employed in the context of licensing schemes which *preserve* the status quo, such as licensing schemes applicable to new adult businesses where, if the license application is denied, the status quo is not changed. There is great potential variation in the degree of injury that delay may inflict on different sorts of speakers, *e.g.*, political speakers versus commercial speakers, and in the amount of "promptness" that might be afforded in administrative/judicial review schemes that preserve the status quo, especially before the subject expressive activity has begun. Examining which ones afford "prompt" judicial review is not before the Court in this case. Since the only ordinance provisions employed in the current case are those involving license *renewal* decisions (which, if negative, administratively *alter* the status quo and therefore require a stay), there is no occasion on these facts to speculate as to any minimal time period that might satisfy, in some other context, a requirement of prompt judicial review.

language certainly applies here where the potential consequences of an erroneous administrative decision altering the status quo are so severe.

CONCLUSION

Under the Waukesha ordinance, absent the grace of the City, an unsuccessful applicant for license renewal almost certainly faces permanent closure of its business. Without any doubt, it faces the loss of its First Amendment rights for a significant period of time. *See Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). The City of Waukesha has chosen not to concern itself with the First Amendment rights of speakers once the City declines to renew permission to speak. It neither provides specific and mandatory maximum time periods for completion of administrative review, nor does it even allow the owner of an existing business who timely files his renewal application the necessary time to complete administrative review before his license will expire. Neither does it provide a stay of the licensing requirement pending completion of either administrative *or* judicial review. For each and all of these reasons, City News asks this Court to hold this permit renewal scheme facially unconstitutional and to reverse the decision of the Wisconsin Court of Appeals

with instructions remanding the matter for further proceedings consistent with its opinion.

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No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Writ of Certiorari
to the Court of Appeals of Wisconsin

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Is a licensing scheme which acts as a prior restraint required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision?

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BRIEF FOR RESPONDENT

OPINIONS BELOW

Opinions and orders were entered in this case at both the administrative and judicial levels. The unpublished findings of the Waukesha Common Council Ordinance and Licensing Committee are reproduced at Respondent's Lodging ("Resp. Lodging"), vol. I, tab 2.[1] The unpublished findings of the Waukesha Common Council are reprinted at Pet. App. 82a-84a. The unpublished findings of the Waukesha Administrative Review Appeals Board are reprinted at Pet. App. 72a-81a.

The Wisconsin circuit court's unpublished opinion and order holding in favor of Respondent City of Waukesha in Petitioner's state-law certiorari action is reprinted at Pet. App. 55a-71a. The Wisconsin court of appeals' unpublished opinion seeking to certify the case to the Wisconsin supreme court is reprinted at Pet. App. 44a-52a. The Wisconsin supreme court's unpublished order denying certification is reprinted at Pet. App. 53a. The Wisconsin court of appeals' order affirming the circuit court's decision is published at 604 N.W.2d 870 and reprinted at Pet. App. 1a-43a. The Wisconsin supreme court's unpublished order denying discretionary review is reprinted at Pet. App. 54a.

JURISDICTION AND SUGGESTION OF MOOTNESS

Petitioner filed a petition for a writ of certiorari on April 17, 2000. This Court granted certiorari, limited to the third question presented by the petition, on June 19, 2000. 120 S.

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[1] For the Court's convenience, Respondent is lodging relevant excerpts of the lower court record in three volumes. Volume I principally contains relevant administrative filings and rulings in chronological order. Volumes II and III contain the pleadings and transcripts from the administrative appeal.

Ct. 2687 (2000). Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

Respondent notes the possibility that this action is moot because even if this Court ruled in Petitioner's favor on the question presented, that ruling would not remedy any injury suffered by Petitioner.[2] This case arises because, pursuant to a municipal ordinance, Respondent City of Waukesha has refused to renew Petitioner's license to operate an adult business. Petitioner's state court complaint alleges that the City's action is invalid because, *inter alia*, the City's ordinance gives the City's decisionmakers effectively unbridled discretion. Resp. Lodging, vol. I, tab 11. If Petitioner had prevailed on that claim or any other that went to the merits of the licensing determination in this case, then the City's decision not to renew Petitioner's license presumably would have been invalidated. The state court of appeals held, however, that the licensing determination was entirely valid, Pet. App. 12a-18a, 29a-42a, and this Court declined to review that holding, 120 S. Ct. 2687 (2000). This Court instead granted certiorari limited to the question whether the Waukesha ordinance is invalid insofar as it fails to guarantee a "prompt judicial decision" on appeal from the City's licensing determination. *Id.*; see Pet. i.

So far as Respondent can determine, a ruling in Petitioner's favor on the single question on which this Court granted certiorari would not redress any injury suffered by Petitioner. Because of this Court's limited order granting certiorari, the lower courts' holding that the City properly declined to renew Petitioner's license is effectively final. All that is left in dispute is whether the lower courts should have issued their decisions on a more expeditious timetable. But

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[2] As discussed fully in the text, the possibility of mootness arose when this Court entered its Order granting certiorari limited to a single question. Respondent accordingly could not have brought the matter to the Court's attention in the brief in opposition.

that question is entirely academic to Petitioner, which no longer has a license and could not on the basis of any decision by this Court seek to have its license reinstated.

Put concretely, if this Court were to rule for Petitioner, the case would be remanded to the Wisconsin courts. Because this Court's holding would not call into question any other aspect of the Waukesha ordinance, the lower courts would simply reaffirm, on the basis of the law of the case, their holding that the City properly refused to renew Petitioner's license. See *Burch* v. *American Family Mut. Ins. Co.*, 543 N.W.2d 277, 279 (Wis. 1996); see also Pet. App. 28a (severing unconstitutional hearing provision). Similarly, res judicata would bar a subsequent plenary action by Petitioner seeking reinstatement of its license. See *Northern States Power Co.* v. *Bugher*, 525 N.W.2d 723, 727-28 (Wis. 1995). The case accordingly appears to be moot. See *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 72-73 (1983) (per curiam) (case mooted when petitioner's injury would remain the same "irrespective of the outcome" in this Court); *Richardson* v. *McChesney*, 218 U.S. 487, 492 (1910) ("The thing sought to be prevented has been done, and cannot be undone by any judicial action.").

So far as Respondent can determine, four arguments that Petitioner could raise in asserting a concrete interest in the outcome of this case are unavailing. First, Petitioner could not apply for a new license and thereby benefit from a decision in its favor in this case. The City's decision not to renew Petitioner's license disables Petitioner as a matter of law from reapplying for a license at that location for one year. Wauk. Mun. Code § 8.195(7)(e). Moreover, Petitioner has made clear its intention to cease operations in Waukesha permanently. See Resp. Lodging, vol. I, tab 14. See generally *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (case moot although plaintiff might again run for Congress, because "[w]e think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a

candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' here"); *Brownlow* v. *Schwartz*, 261 U.S. 216, 217 (1923) ("The case has become moot for two reasons: (1) because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed, and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.").

Second, this is not one of the limited classes of cases in which the normal case-or-controversy requirement should be relaxed because the question is capable of repetition yet evading review. See *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam). It is correct that an adult business's license generally will expire before this Court can rule on a challenge of this sort. But adult businesses are free to challenge the constitutionality of licensing ordinances in plenary actions at any time. See *infra* at 37-38. Such suits generally are not mooted by the passage of time because (a) the adult business continues to satisfy the requirements for a license, or (b) the challenge is brought by an applicant for a *new* license, as in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). Indeed, it appears that every other decision involved in the circuit conflict on the question presented by this case arose from a plenary civil rights action. See Pet. App. 21a-22a (collecting cases). So far as the decisions of the courts of appeals reflect, none of those cases became moot on appeal.

Third, this case is not saved from mootness on the ground that it is a facial challenge to the Waukesha ordinance. A party may bring a facial challenge alleging the overbreadth of a statute before its application. *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). But that party must still have a concrete interest in the outcome of the challenge. See *FW/PBS*, 493 U.S. at 233-35.

Fourth, petitioner could not assert a right to damages or any other remedy on the basis of a holding in its favor by this Court. Petitioner's complaint includes a generic claim for appropriate relief but does not state a claim for damages (see Resp. Lodging, vol. I, tab 11, at 4-5), and Petitioner has never requested damages at any stage of the case. Moreover, the City did not in fact revoke Petitioner's license or otherwise take any action against City News & Novelty during the pendency of the state court proceedings. Instead, the Common Council passed a resolution expressly stating that Petitioner would be allowed to continue operating at least until the trial court's decision on Petitioner's appeal, Resp. Lodging, vol. I, tab 9 – precisely the same result as Petitioner maintains is required by the First Amendment.

For the foregoing reasons, the Court may find it appropriate to dismiss the petition for a writ of certiorari as improvidently granted. See *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 621 n.1 (1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech * * * ." The provisions of Waukesha Municipal Code § 8.195 are reprinted in the appendix to this brief at 1a-14a. The provisions of Chapter 68 of the Wisconsin Statutes are reprinted in the appendix to this brief at 15a-21a.

Respondent calls to the Court's attention an amendment to Section 8.195 that, while relevant to this case, does not affect the question on which this Court granted certiorari for the reasons discussed *infra* at 20-24. See *Diffenderfer* v. *Central Baptist Church of Miami, Fla.*, 404 U.S. 412, 414 (1972) (per curiam) (this Court will "review the judgment * * * in light of [the] law as it now stands, not as it stood when the judgment below was entered" (citing *Hall* v. *Beals*, 396 U.S. 45, 48

(1969); *United States* v. *Alabama*, 362 U.S. 602, 604 (1960))). In the proceedings below, the Wisconsin court of appeals invalidated and severed subsection (3)(d) of the Waukesha ordinance, which guaranteed an adult business the right to a hearing on appeal from a decision not to grant or renew a license. The court of appeals held that the hearing provision failed to provide a specific deadline for ruling after the hearing. Pet. App. 25a-26a. In response to that decision, the Waukesha Common Council amended subsection (3)(d) to guarantee that "[a] final determination stating the reasons therefore, together with a copy of any official recording or transcript of the hearing, shall be rendered within 20 days of the commencement of the hearing."

STATEMENT

Respondent first outlines the requirements for securing and renewing a license to operate as an adult business in Waukesha, Wisconsin. It then recounts the procedural history of this case, including the bases for the City's refusal to renew the license of Petitioner City News & Novelty.

I. WAUKESHA'S ADULT BUSINESS LICENSING SCHEME

Respondent City of Waukesha is located sixteen miles west of Milwaukee, Wisconsin and has a population of approximately 64,000. An "adult oriented establishment" must have a license to operate in Waukesha. See Wauk. Mun. Code ("WMC") § 8.195(2). Licensing is governed by the Municipal Code, which defines such an establishment to include businesses that feature topless dancers or strippers, that provide facilities to view adult films, or that have as a substantial portion of their stock in trade the sale, rental, or viewing of adult films or periodicals. *Id.* § 8.195(1); see also *id.* (defining adult films and periodicals by reference to specified anatomical areas and sexual activities).

In enacting the ordinance, the City concluded based on the experience of other municipalities that adult businesses can

lead to "increased levels of criminal activities including prostitution" and other dangerous transient sexual acts, and furthermore can undermine the value of surrounding properties. WMC § 8.195 (preamble). The requirements of the ordinance seek to target these adverse secondary effects directly. Particularly relevant to this case, an adult business may not admit minors, may not permit customers to engage in sexual acts on the premises, and must ensure that any booths for viewing adult films are open, accessible, and well lighted. WMC § 8.195(9)(a), (b), (c), (10)(c). Thus, in determining whether to grant or renew a license, the City does not inquire into the content of the applicant's speech, as by determining whether films or periodicals are obscene, which is a matter left entirely to state law. See Wis. Stat. § 944.21. Nor do the criteria for securing a license restrain speech in any respect.

A license to operate an adult establishment, once granted, must be renewed annually. WMC § 8.195(7)(a). Renewal applications should be filed at least sixty days before expiration, but the only penalty for failing to meet that deadline is that the City assesses a late fee of $100. *Id.* § 8.195(7)(a), (b).

The initial determination whether to renew a license is made by the Common Council (which is the city council) based on a recommendation by its Ordinance and Licensing Committee. Throughout the administrative process, the burden of proving that a license should not be renewed rests on the city attorney. Pet. App. 80a-81a. The City makes an initial determination whether to renew a license within twenty-one days of receiving the application, and the city clerk is tasked with notifying the applicant of the ruling. WMC § 8.195(3)(c).

If the City declines to renew a license, only the business may appeal; municipal officials may not at any stage of the administrative process seek review of a decision to renew a license. Specifically, the adult business may elect to appeal the nonrenewal determination under either the municipal code, see WMC § 8.195(3)(d), or state law, see Wis. Stat. ch.

68. (The state scheme remains available under Wisconsin law unless a municipality expressly elects not to follow it, see *Tee & Bee, Inc.* v. *City of West Allis*, 571 N.W.2d 438, 441 (Wis. Ct. App. 1997) (citing Wis. Stat. § 68.16), which Waukesha has not done, see WMC §§ 2.11(1), 8.195(11); Pet. App. 23a, 28a.)

Under the municipal scheme, including the amended hearing provision (see *supra* at 5-6), the City's decisionmaking takes a maximum of fifty-one days. Within ten days of an initial nonrenewal decision by the City, the business may file an appeal with the City's Administrative Review Appeals Board ("Appeals Board"), required to be an impartial decisionmaker, which must hold a hearing within ten days. WMC § 8.195(3)(d) (incorporating Wis. Stat. § 68.11(2)). The hearing permits representation by counsel, the presentation of evidence and witnesses sworn under oath, and cross-examination of opposing witnesses. *Id.* The adult business's counsel may issue subpoenas. *Id.* The business may also require that an official record of the proceedings be made at the City's expense. *Id.* (incorporating Wis. Stat. § 68.11(3)). The Board must issue a ruling, together with a copy of the record, within twenty days of the commencement of the hearing. WMC § 8.195(3)(d).

If the adult business exercises its right to pursue an appeal under the alternate state system instead, the City's decisionmaking takes a maximum of seventy-one days because the business proceeds through an additional stage of review and because the time periods for appealing and for conducting the hearing before the Appeals Board are extended. An initial determination not to renew a license may be appealed within thirty days to the Common Council, which must make its decision within fifteen days. Wis. Stat. §§ 68.08, 68.09(3). If the Council votes not to renew the license, the business may within thirty days seek review before the Appeals Board, which must hold a hearing within fifteen days and issue a

ruling within twenty days thereafter. *Id.* §§ 68.10(2), 68.11(1), 68.12(1).

Under either the municipal or the state scheme, if the Appeals Board votes not to renew a license, the business may *as a matter of right* secure judicial review by filing a state circuit court certiorari action within thirty days. Wis. Stat. § 68.13; WMC § 8.195(3)(d). In such an action, the City's licensing determination carries a presumption of correctness, such that the court will inquire only whether "(1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question." Pet. App. 8a (citing *State* v. *Goulette*, 222 N.W.2d 622, 626 (Wis. 1974)); see also *id.* 55a-56a. Nor may the court "add to the record or take new evidence except in unusual circumstances." *Id.* 70a. The court "may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision." Wis. Stat. § 68.13(1). These remedies, however, are not exclusive. *Id.* § 68.01.

II. The Nonrenewal of Petitioner's License

1. Petitioner's violations of the ordinance.

Beginning in 1989, Petitioner City News & Novelty operated in the heart of downtown Waukesha, two doors from a children's toy store and near several churches. Petitioner sold a variety of products, including drug paraphernalia (such as pipes and rolling papers generally used for smoking marijuana) and sexual novelty items. Petitioner also provided booths in which patrons could watch pornographic videotapes and sold a variety of pornographic videotapes and magazines. Because these adult materials constituted a substantial portion of its stock in trade, Petitioner was required to be licensed as an adult oriented establishment. See WMC § 8.195(2)(a).

From 1990 to 1994, Petitioner annually requested and received renewals of its license. There is no suggestion in the record that the City, either in that period or later, *ever* harassed or improperly treated Petitioner or its customers.

This case arises because Petitioner persistently violated the municipal code in late 1994 and throughout 1995. On several occasions, police officers found minors on the premises. Patrons in several instances were found engaging in sexual acts and exposing themselves to others in the store. (Rather than detail here the explicit nature of the sexual acts, some of which go well beyond what Petitioner euphemistically describes as "solitary lewd conduct," Pet. Br. 9, Respondent directs the Court's attention to the administrative record. See Resp. Lodging, vol. I, tab 2, at 2; *id.*, tab 10, at 6-11.) Petitioner also modified the entrance to its booths to obstruct open visibility and failed to correct that violation of the code despite repeated warnings from the city's building inspector. *Id.*, tab 10, at 8-9.

2. THE ADMINISTRATIVE PROCEEDINGS.

On November 17, 1995, Petitioner applied for renewal of its operating license for the annual period beginning January 26, 1996. Resp. Lodging, vol. I, tab 1. The application was considered at the December 18, 1995, meeting of the Common Council's Ordinance and License Committee, which voted to recommend nonrenewal based on Petitioner's numerous violations of the municipal code over the previous year. *Id.*, tab 2. The Common Council adopted that recommendation the next day. *Id.*, tab 3.[3]

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[3] Apparently due to issues relating to the scheduling of Council meetings, the City in this case made its determination in 31 days, rather than the 21 days specified by WMC § 8.195(3)(c). Respondent does, however, view the 21-day deadline as binding (and, indeed, will defer the expiration of a license for the length of any period in which the City fails to comply with a mandatory deadline),

Because Petitioner informally advised the City of its intention to appeal pursuant to the state scheme rather than the municipal scheme, the Common Council scheduled the matter for consideration at its next meeting on January 16, 1996. But by that date, some four weeks after the initial determination, Petitioner still had not appealed. Resp. Lodging, vol. I, tab 4. Petitioner waited until the last possible day (which fell only a week before its license was set to expire) to file its short notice of appeal. *Id.*, tab 5. Within days, the Council held a special session, at which it reviewed Petitioner's application and decided against renewal. *Id.*, tab 6. At that time, the Council passed a resolution guaranteeing Petitioner's right to operate pending review before the municipal Appeals Board. *Id.*

Petitioner waited a full three weeks before filing its one-sentence petition for review before the Appeals Board. Resp. Lodging, vol. I, tab 7. Petitioner also advised the City that it was waiving all time limits on the disposition of its appeal. *Id.*, tab 8; see also Wis. Stat. § 68.09(3) (providing that applicant may waive applicable deadlines).

Subsequently, the Council passed a special resolution further extending Petitioner's license to operate pending any later judicial review in state trial court. Resp. Lodging, vol. I, tab 9. As would become apparent, Petitioner therefore had no incentive to proceed through the appeals process expeditiously. (*Amicus* Liberty Project thus is correct, Br. 14, that "17 months elapsed between City News's application for a license and the first judicial decision on the merits," but responsibility for that delay lies squarely on the shoulders of Petitioner.)

The Appeals Board met four times regarding Petitioner's license. Resp. Lodging, vols. II and III (transcripts). The additional dates were provided principally to accommodate Pe-

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which is the relevant point for purposes of this facial challenge to the ordinance.

titioner's request that it be able to locate, interview, and subpoena witnesses who had knowledge of Petitioner's alleged violations of the municipal code and because Petitioner made extraordinarily extensive use of its right to examine witnesses and to raise objections. At the hearings, detailed testimony was received. Both Petitioner and the city attorney (who opposed renewal) also submitted extensive briefs and proposed findings of fact, as well as responses to each other's submissions. *Id.*, vol. II, tabs 1-6. On June 28, 1996, the Board issued a decision sustaining the nonrenewal determination and setting forth detailed reasons for its decision. *Id.*, vol. I, tab 10.

3. THE CIRCUIT COURT PROCEEDINGS.

Petitioner commenced this suit on July 15, 1996, filing a state-law certiorari action to appeal the City's decision not to renew its license. Resp. Lodging, vol. I, tab 11. Petitioner did not challenge either the constitutionality of the Wisconsin state law statutory scheme for appealing licensing determinations or the renewal criteria set forth in WMC § 8.195. See Pet. App. 57a (trial court ruling; "plaintiff is not attacking Wisconsin Statute Chapter 68"); *id.* 59a ("Plaintiff does not attack the nature of the conduct which 'if found' constitute a violation of the ordinance."). Instead, the complaint alleged that the nonrenewal was invalid because the City's decision was based on insufficient evidence, because the nonrenewal determination rested on conduct not properly attributable to Petitioner, because Petitioner allegedly did not have sufficient notice of its violations of the municipal code, and because "Ordinance No. 8.195 is void and unconstitutional." Resp. Lodging, vol. I, tab 11, at 3-4. Petitioner subsequently delayed the circuit court's ruling on its complaint, successfully requesting a forty-five-day extension of time to file its brief on the merits and a further fifteen-day extension to file its reply brief. *Id.*, tab 12.

After briefing was completed, the circuit court ruled for Respondent. See Pet. App. 55a-71a. The court first rejected

each of Petitioner's facial challenges to WMC § 8.195. The court concluded that the ordinance sufficiently limits the discretion of city officials, given that it sets out express criteria for renewal and specifies that particular municipal violations must be found in order to justify nonrenewal, a determination that "is then subject to review [in court] under the substantial evidence test." Pet. App. 58a-60a. Furthermore, the ordinance sets sufficient time limits on the licensing determination because it contains specific time periods and the City specifically must complete all inspections of an adult business within the twenty-one-day period for making a license determination. *Id.* 60a-64a.

The circuit court also rejected each of Petitioner's specific arguments regarding the application of WMC § 8.195 in this case. The court concluded that the City's decision had been made by impartial decisionmakers at each stage and that the City had provided Petitioner with sufficient warning of the charged violations of the municipal code. Pet. App. 65a-69a. The City also was justified in refusing to renew Petitioner's license rather than merely suspending it, a decision that is "within the discretion of the licensing authority." *Id.* 69a. Finally, each of the violations found by the Board was supported by substantial evidence. *Id.* 70a-71a.

4. THE APPELLATE PROCEEDINGS.

On Petitioner's appeal, the Wisconsin court of appeals affirmed, Pet. App. 1a-43a,[4] specifying from the outset (as had the circuit court) that Petitioner challenged only the

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[4] The case was delayed in the court of appeals for two reasons outside the parties' control. The court of appeals unsuccessfully sought to refer the case to the state supreme court. Pet. App. 44a-52a, 53a. The court of appeals also stayed the proceedings on appeal for nine months pending the state supreme court's decision in another case, *County of Kenosha* v. *C & S Management*, 588 N.W.2d 236 (Wis. 1999), which ultimately proved nondispositive in this case.

Waukesha ordinance, not the separate state scheme. Pet. App. 2a (court of appeals ruling; explaining that petitioner alleged "that the City's adult establishment licensing scheme is unconstitutional"); *id.* 28a ("ch. 68 sets forth narrow, definite and objective standards for bringing an appeal, and City News does not directly challenge this chapter").

The court of appeals held that the immediate availability of judicial review as a matter of right through a certiorari proceeding to challenge the nonrenewal of a license constitutes "prompt judicial review" as required by this Court's decision in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). See Pet. App. 22a. The court of appeals specifically contrasted this Court's determination in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), that a content-based censorship law "must 'assure a *prompt final judicial decision*,'" Pet. App. 20a (quoting 380 U.S. at 59) (emphasis in court of appeals' opinion), with Justice O'Connor's later determination for the plurality in *FW/PBS* that a content-neutral licensing scheme need only provide "the 'possibility' and 'availability' of prompt judicial *review*," *id.* (quoting 493 U.S. at 227, 228 (emphasis added)). Moreover, a municipality does not even have the power to require a state court to decide a licensing challenge on an expedited schedule. *Id.* 22a. The court of appeals therefore held, agreeing with the First, Fifth, and Seventh Circuits, that "prompt *access* to judicial review qualifies as 'prompt judicial review'" under *FW/PBS*. *Id.* 21a-22a (emphasis in original). That requirement was fully met here because Petitioner had the right, which it duly exercised, to file a certiorari action immediately after the Appeals Board's decision. *Id.*

The court of appeals rejected Petitioner's remaining allegations that WMC § 8.195 is facially invalid, holding that "the City's licensing scheme does set forth specific guidelines and expressly provides that a violation of such guidelines constitutes a ground for nonissuance or nonrenewal." Pet. App. 15a. Furthermore, the ordinance both provides a specific twenty-one-day time limit in which the City must make the renewal determination and also maintains the status quo during the renewal determination "because the common council's review of an application is completed prior to expiration of the license." *Id.* 19a. Finally, an application must be reviewed by an impartial decisionmaker. *Id.* 29a (citing Wis. Stat. § 68.11(1)).

The court of appeals also rejected Petitioner's challenges to the application of WMC § 8.195 in this case. Not only were the City's decisionmakers impartial, but the City also satisfied every other requirement of due process, "providing notice of the charges, an opportunity to respond to and challenge the charges, an opportunity to present witnesses, and an opportunity to confront and cross-examine opposing witnesses." Pet. App. 31a-36a. Moreover, nonrenewal rather than mere suspension was the appropriate sanction for Petitioner's "*nine* separate ordinance violations occurring within a one-year period." *Id.* 37a (emphasis added). Indeed, because multiple violations resulted in convictions of a City News & Novelty director, "suspension [was] not an available sanction in this case." *Id.* Finally, substantial evidence (including sworn testimony of several police officers) supported each finding of a violation by Petitioner. *Id.* at 38a-42a.

The court of appeals did agree with Petitioner, however, that WMC § 8.195 was invalid in a single respect that the City has since corrected by amending the ordinance. See *supra* at 5-6. Under subsection 3(d) as then enacted, if an applicant appealed from a nonrenewal determination, the Common Council was required to conduct a hearing within ten days, but otherwise was "given no direction as to what it must do following the hearing or when it must presumably take action in response to the hearing." Pet. App. 25a-26a. In the court of appeals' view, the ordinance thereby "create[d] a risk of an indefinite delay by putting an applicant at the mercy of the licensing body." *Id.* 25a. But the court of appeals concluded that, as a matter of Wisconsin law, the invalid public hearing

provision was severable from the remainder of the city ordinance, which was otherwise constitutional. *Id.* 26a-28a. In response to the court of appeals' decision, Waukesha amended subsection 3(d) to specify that the Council must issue a decision within twenty days of the commencement of the hearing. See *supra* at 5-6.[5]

5. THIS COURT'S ORDER GRANTING CERTIORARI.

After the Wisconsin supreme court denied Petitioner's request for review, Pet. App. 54a, this Court granted certiorari limited to the third question presented by Petitioner: whether "a licensing scheme which acts as a prior restraint [is] required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision." Pet. i; 120 S. Ct. 2687 (2000) (order granting certiorari). The petition for certiorari explained that the court of appeals' determination that the First Amendment does not require a prompt judicial decision on an appeal from a licensing determination was the subject of a conflict in the circuits. Pet. 15-16. The Court declined to consider, however, Petitioner's challenges that went to the merits of the actual licensing determination in this case – *viz.*, whether the burden of persuasion should have been placed on the City in the judicial proceedings and whether WMC § 8.195 grants the City effectively unbridled discretion to refuse to renew a license.

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[5] Compare WMC § 8.195(3)(d) (as at Oct. 20, 1999), *quoted in* Pet. App. 24a ("If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.") *with* WMC § 8.195(3)(d) (current version) ("If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter in conformity with sec. 68.11(2), (3), Wis. Stats. A final determination stating the reasons therefore, together with a copy of any official recording or transcript of the hearing, shall be rendered within 20 days of the commencement of the hearing.").

SUMMARY OF ARGUMENT

I. Petitioner principally argues that Chapter 68 of the Wisconsin Code is unconstitutional because it fails to guarantee that an adult business's license-renewal application will be ruled upon before the license expires. That argument fails because an adult business may forgo Chapter 68's administrative appeal procedures and instead utilize the municipal scheme provided by WMC § 8.195(3)(d), under which administrative review will be completed before its license expires.

In any event, Petitioner's challenge to Chapter 68 is not properly presented. This Court granted certiorari limited to the question whether WMC § 8.195 is invalid because it fails to guarantee a "prompt judicial decision" on appeal from an administrative licensing decision. Petitioner's argument, by contrast, is a challenge to Chapter 68 (not WMC § 8.195) and to the time limits for rendering an administrative decision (not the time limits for rendering a judicial decision on appeal). Indeed, Petitioner waived the argument it presses here by failing to raise it in the lower courts.

II. WMC § 8.195 is constitutional because it provides an adult business with "access" to "prompt judicial review" as required by the plurality in *FW/PBS, Inc.* v. *City of Dallas*. The adult business may appeal as a matter of right from the administrative proceedings, which (as noted) will conclude before its license expires. Petitioner relies on inapposite decisions (principally *Freedman* v. *Maryland* and its progeny) holding that the First Amendment requires a "prompt judicial *decision*" on appeal from a determination by a *censor* that speech should be prohibited based on its *contents*. By contrast, the ordinance at issue here (like the ordinance in *FW/PBS*) involves no censorship and no evaluation of the content of Petitioner's speech.

The prophylactic concerns underlying the *Freedman* line of cases thus are inapplicable here. First, the *FW/PBS* plural-

ity squarely rejected the argument that an adult business will be deterred from applying for a license by the absence of a guaranteed "prompt judicial decision." That conclusion is amply justified with respect to WMC § 8.195, which provides adult businesses with numerous procedural protections. In addition, an adult business may secure injunctive relief to prevent the expiration of its license in appropriate cases.

Second, a "prompt judicial decision" is not required on the ground that courts have unique expertise in this area. Unlike determinations regarding the content of protected speech, it is *municipalities* that have expertise in determining whether content-neutral regulatory ordinances have been violated. Here, for example, a court has no particular expertise in determining whether minors were found on Petitioner's premises and whether patrons were engaging in sex acts on the premises. And, again, the ordinance's numerous procedural protections guarantee that the administrative process will be fair and thorough. To be sure, courts do have special expertise in determining whether municipal ordinances are themselves constitutional, but such claims are properly brought as plenary civil rights actions in court.

Petitioner's remaining arguments for extending the "prompt judicial decision" requirement to the context of municipal licensing are unavailing. Petitioner primarily argues that municipal officials are unfaithful to the Constitution, a scurrilous claim that has no foundation in the record. Petitioner also fails to acknowledge the sea change its theory would work in municipal law and the role of the courts. Adult businesses would have a free pass to violate any content-neutral regulation, such as tax and sanitation laws, until the courts approved an appropriate administrative sanction. The same would of course be true for expressive businesses of every kind, including publishers, newsstands, and movie theaters. Nothing in the *Freedman* line of cases supports such an extraordinary result.

ARGUMENT

I. PETITIONER'S PRINCIPAL ARGUMENT, IN WHICH IT CHALLENGES THE TIMING OF ADMINISTRATIVE DECISIONMAKING UNDER A WISCONSIN STATE STATUTE, IS BOTH WRONG AND IRRELEVANT TO THE QUESTION PRESENTED.

Petitioner's principal argument in this Court is that a Wisconsin state law, Chapter 68 of the Wisconsin Statutes, is invalid because it fails to guarantee that a municipality will issue a decision on an application to renew an adult business license before the license expires. Specifically, although an adult business in Waukesha may submit a renewal application sixty days prior to expiration of its license, the state statute permits the municipality a longer period – up to seventy-one days – to complete the administrative process. Indeed, Petitioner maintains, the time may be still longer because the statute does not specify how long a required "hearing" may last. See, *e.g.*, Pet. Br. 19-20.

1. THE FIXED ADMINISTRATIVE TIME LIMITS SATISFY THE FIRST AMENDMENT.

Petitioner's arguments need not detain this Court because, wholly apart from the state statute, the Waukesha ordinance itself guarantees that the administrative process will be completed in less than sixty days and further specifies the length of the administrative appeal hearing. In response to the decision of the court of appeals invalidating a prior version of the municipal hearing provision, WMC § 8.195(3)(d), the City amended that subsection of the ordinance to provide that the Appeals Board must issue a "final determination * * * together with a copy of any official recording or transcript of the hearing * * * within 20 days of the commencement of the hearing." As a result, the City has a maximum of fifty-one days to complete the administrative review process. In this facial challenge, in which Petitioner seeks prospective relief, it is the current version of the ordinance that is relevant to this

Court's decision. *Diffenderfer* v. *Central Baptist Church of Miami, Fla.*, 404 U.S. 412, 414 (1972) (per curiam), *quoted supra* at 5. The Court's practice is reflective of the sound view that the lower courts should be given the first opportunity to address the constitutionality of an amended statute or ordinance. See, *e.g.*, *Fusari* v. *Steinberg*, 419 U.S. 379, 389 (1975); cf. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (noting the advantage of "procuring the benefit of the lower court's insight before we rule on the merits").

Petitioner is correct that under the separate statutory scheme, the administrative process may take up to seventy-one days. But that hardly makes the statute unconstitutional, given that the adult business has the option of pursuing the more expeditious municipal appeals process. Moreover, even if it prefers the state scheme, the adult business is free to submit its renewal application more than seventy-one days before its license expires. See WMC § 8.195(7)(a) (application should be submitted a *minimum* of sixty days in advance). On Petitioner's alternative view, the entire administrative scheme must be held unconstitutional because the City will accept renewal applications up to the date that an applicant's license expires, see *id.* § 8.195(7)(b), which by definition means that in some instances an applicant can choose to apply later than the minimum time the City may take to make its decision. This accordingly is not a case in which a licensing scheme is invalid because there is "no means by which *an applicant* may ensure" that its application will be decided in a timely manner. *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion) (emphasis added).

2. PETITIONER'S ARGUMENT IS OUTSIDE THE SCOPE OF THE QUESTION PRESENTED.

Petitioner's argument is also irrelevant because this Court granted certiorari on a very different issue: whether a licensing scheme is "required to contain explicit language which prevents injury to a speaker's rights from want of a prompt *judicial* decision." Pet. i (emphasis added); see 120 S. Ct. 2687 (2000) (granting certiorari limited to question three). As the petition for certiorari explained, the lower courts are divided over whether a municipal licensing scheme is invalid if it fails to guarantee that the adult business's appeal will be promptly decided. Pet. 15-16; see also Pet. App. 21a-22a. In this case, the Wisconsin court of appeals agreed with the First, Fifth, and Seventh Circuits that *FW/PBS, Inc.* v. *City of Dallas* requires only that the municipality provide access to prompt judicial review, although it noted the contrary view of other courts of appeals. Pet. App. 21a.

In an attempt to suggest that its arguments fall within the question presented, Petitioner makes three substantial misstatements. First, Petitioner seriously misstates the question presented, asserting that this Court agreed to consider: "When a licensing ordinance contains a renewal requirement, must the ordinance include explicit language to prevent injury to a speaker's rights from want of a prompt *administrative* or judicial decision?" Pet. Br. 14 (emphasis added). *Compare* Pet. i. Petitioner's attempted addition of "administrative" is critical here, for it raises entirely different questions under the First Amendment and does not implicate the circuit conflict that caused this Court to grant certiorari.

Second, Petitioner incorrectly asserts that in the proceedings below it challenged the timing of administrative proceedings under the state statutory scheme and specifically the statutory provision for holding an administrative hearing. According to Petitioner, it "raised the open-ended nature of administrative review under Chapter 68." Pet. Br. 12 n.12. In reality, Petitioner's complaint relates only to the Waukesha ordinance; it does not allege that those provisions of Chapter 68 are unconstitutional. See Resp. Lodging, vol. I, tab 11. Indeed, both the trial court and the court of appeals went to pains to note that Petitioner challenged only the Waukesha ordinance, not the separate state statutory scheme. See *supra* at 12, 14.

Petitioner cites two pages in its court of appeals brief as supposedly setting forth its challenge to Chapter 68. Pet. Br. 12 n.12 (citing Pet. C.A. Br. 23-24). Even if Petitioner had raised such a claim in the state court of appeals, upon which that court unquestionably never passed, it would not be presented here because the Wisconsin courts follow the traditional rule that claims not raised in the trial court cannot be raised for the first time on appeal. *Terpstra* v. *Soiltest, Inc.*, 218 N.W.2d 129, 133 (Wis. 1974). This Court, in turn, will consider only questions properly presented in or passed upon by the court below. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

In any event, the cited pages of Petitioner's court of appeals brief – which Respondent is including in its lodging for the Court's convenience, see Resp. Lodging, vol. I, tab 13 – make no such argument. In a single sentence, Petitioner noted that Wis. Stat. § 68.09 includes "no requirement that the decision on review be made within any certain period of time." But this one sentence does not purport to be a free-standing challenge to deadlines under Chapter 68. Instead, Petitioner's point responded to the trial court's holding that the hearing provision of the Waukesha ordinance is valid because it, in turn, incorporates Section 68.09. Pet. App. 61a-62a. In disagreeing with the trial court on this issue, the court of appeals did not consider the requirements or the constitutionality of the state statute's hearing provision. *Id.* 24a-28a.

Third, and relatedly, Petitioner incorrectly states that the court of appeals passed upon the constitutionality of the timing of administrative decisions under Chapter 68, including specifically the statute's administrative hearing provision. Pet. Br. 12-13. Of course, because the decision below never purports to do any such thing, Petitioner is forced to contend in a footnote that "[t]he Court's upholding of the Chapter 68 procedures was implicit." *Id.* n.13. But at every turn, and as to every claim, the court of appeals made clear that it was

passing only on the constitutionality of the Waukesha ordinance.[6]

Petitioner fares no better in asserting that its challenges to Chapter 68 are fairly included within the question presented. According to Petitioner, "Because the open-ended nature of the administrative time frame necessarily delays the point in time at which judicial review may be initiated, such a flaw is within the scope of the question presented because it causes the time frame for judicial review to be open-ended and indefinite." Pet. Br. 19. In other words, Petitioner maintains that because Chapter 68 permits a municipality to take up to seventy-one days to review a license renewal application and does not set a fixed schedule for the hearing on appeal, an applicant will be unable to go to court on a date certain and, in turn, the statute by definition cannot guarantee "prompt judicial review."

In the first place, even if the legal *issue* raised by Petitioner were "fairly included" in the question presented, that

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[6] Pet. App. 9a ("**First Amendment Protections**. City News raises a number of facial challenges to the constitutionality of the City's licensing scheme."); *id.* 12a ("1. *Renewal Standards*. City News first contends that the ordinance is unconstitutional because it fails to provide explicit standards for license renewal."); *id.* 16a ("2. *Inadequate Time Limits*. City News contends that the City's licensing scheme is defective because it does not prescribe mandatory time limits for the application process."); *id.* 19a ("3. *Preserving the Status Quo*. City News contends that the ordinance is defective because it fails to explicitly require preservation of the status quo pending judicial review of a license denial or revocation."); *id.* 20a ("4. *Prompt Judicial Review*. City News next asserts that the ordinance does not guarantee 'prompt judicial review,' as established by the Supreme Court in ***Freedman***."); *id.* 24a (5. *Public Hearing Provision*. City News further argues that an indefinite time period is created as to the public hearing set forth under MUNICIPAL CODE § 8.195(3)(d).") (emphases in original) (paragraph numbering omitted).

would not justify passing on the constitutionality of a *statute* that was not addressed in the proceedings below. Furthermore, the administrative appeals procedure of Chapter 68 does not delay the availability of judicial review for an applicant, which can instead proceed under the more expeditious municipal scheme.

In any event, Petitioner's argument is a non sequitur. Because the court of appeals had invalidated the hearing provision set forth in the ordinance itself, this Court necessarily presumed in granting certiorari that it would determine whether the judicial review provisions of the Waukesha ordinance were, standing alone, invalid for failure to guarantee a "prompt judicial determination." On Petitioner's far broader view of the question presented, it has the right to challenge in this Court any aspect of the timing of the administrative proceedings – such as the deadlines for filing an application, the deadlines for the adult business to appeal, and the timing for providing a transcript of the hearing – all of which affect the point in time at which the adult business may pursue judicial review, but none of which has anything to do with the actual question presented.[7]

II. WAUKESHA MAKES PROMPT JUDICIAL REVIEW AVAILABLE TO APPLICANTS FOR ADULT-BUSINESS LICENSES.

Petitioner's argument that WMC § 8.195 is unconstitutional for failure to guarantee a "prompt judicial determination" on appeal from an administrative licensing decision is

[7] Indeed, Petitioner obliquely argues in this Court that the statute is unconstitutional because it does not guarantee when the applicant will be provided a transcript of the administrative proceedings. Pet. Br. 8. The amended Waukesha ordinance, however, guarantees that the applicant will be provided a copy of the transcript at the same time as the Appeals Board renders its decision. WMC § 8.195(3)(d).

unavailing. The decisions on which Petitioner relies all arise in a very different context: First Amendment challenges to laws permitting administrative decisionmakers to *censor* expressive materials based on judgments about the *content* of those materials. The Waukesha ordinance, by contrast, involves neither an inquiry into the content of the materials sold by Petitioner nor censorship of any kind. Moreover, as the plurality opinion in *FW/PBS, Inc.* v. *City of Dallas* makes quite clear, the prophylactic concerns underlying the "prompt judicial determination" requirement are absent here: there is no risk that adult businesses will elect not to pursue licenses and courts are not uniquely suited to making content-neutral licensing determinations (indeed, precisely the opposite is true). Finally, Petitioner's argument necessarily implies a right of all expressive businesses (including newsstands, movie rental stores, and television stations) to continue to operate pending judicial review notwithstanding their failure to follow all manner of content-neutral regulatory statutes (such as the obligation to pay taxes or to follow sanitation laws). That cannot be a correct reading of the First Amendment.

1. THE PROMPT JUDICIAL DETERMINATION REQUIREMENT APPLIES TO CONTENT-BASED CENSORSHIP SCHEMES, NOT CONTENT-NEUTRAL LICENSING ORDINANCES.

Petitioner's argument is flawed from the outset because it rests on precedents holding that a court must issue "a prompt judicial decision *of the question of the alleged obscenity* of" a work that has been censored. *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141 (1968) (per curiam) (emphasis added); see also *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 63 (1989) (precedents hold "that pretrial seizures of expressive materials could only be undertaken pursuant to a procedure designed to focus searchingly *on the question of obscenity*" (emphasis added) (internal quotation marks and multiple citations omitted)); *New York* v. *P.J. Video*, 475 U.S. 868, 873 (1986) (ju-

dicial determination relates to question of "obscenity" (multiple citations omitted)).

Thus, *Freedman* v. *Maryland* held that a state board of censors had the burden of securing a prompt judicial decision confirming an order prohibiting exhibition of a film. 380 U.S. 51 (1965). *Southeastern Promotions* v. *Conrad* applied the same requirement to a municipal review board authorized to determine which stage productions could, based on their content, appear at municipal theaters. 420 U.S. 546 (1975). See also *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (invalidating statute permitting seizure of films based on showing that theater previously screened obscene materials when, *inter alia*, statute failed to guarantee prompt judicial determination on question of obscenity); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) (imposing prompt judicial determination requirement upon customs regulation authorizing seizure of "obscene or immoral" imported materials); *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (invalidating statute authorizing Postmaster General to seize obscene materials for failure to guarantee prompt judicial determination); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968) (per curiam) (invalidating ordinance that banned exhibition without approval of board of censors but did not provide for prompt judicial determination).

In contrast to these decisions addressing content-based censorship schemes, this Court did not impose the "prompt judicial determination" requirement when it reviewed an adult-business licensing ordinance in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). Justice O'Connor's opinion for the plurality in *FW/PBS* recognized that "the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.* at 229. Thus, "the licensing scheme * * * does not present the grave 'dangers of a censorship system.'" *Id.* (quoting *Freedman*, 380 U.S. at 58). The

plurality accordingly concluded that the First Amendment requires a municipality only to guarantee the "possibility" or "availability" of "prompt judicial *review*," 493 U.S. at 228 (emphasis added), rather than, as was required in *Freedman* and its progeny, a "prompt judicial *determination*," 380 U.S. at 60 (emphasis added).[8] The plurality's conclusion followed directly from *Southeastern Promotions* and *Freedman*, which reasoned that the "prompt judicial determination requirement" rests on essentially the same ground as the procedural safeguard, not applicable to licensing schemes, requiring censors to institute judicial proceedings to confirm their decisions. *Southeastern Promotions*, 420 U.S. at 560; *Freedman*, 380 U.S. at 58.

The Waukesha ordinance makes "prompt judicial review" "available" to adult businesses, as required by the *FW/PBS* plurality. Under the time limits set by the ordinance, the City will complete its review of a renewal application, both as an initial matter and on administrative appeal, within fifty-one days. The ordinance provides that a renewal application should be submitted at least sixty days before the license expires. Because the adult business's essentially *pro forma* notice of administrative appeal takes almost no time to prepare and file, the applicant is assured that its license will remain in effect throughout the administrative process. Once that process is completed, if the City determines not to renew the license, the applicant may proceed immediately to court where, as we explain below, it may seek a restraining order requiring that the license remain in effect.[9] The ordinance thus guaran-

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[8] Thus, although the *FW/PBS* plurality described this procedural safeguard as "essential," it did not conclude that, in the unique context of municipal licensing, "prompt judicial review" means the issuance of a decision on a fixed, accelerated timetable.

[9] Section 8.195 thus stands in contrast to other statutory provisions, under which there is no right to judicial review at all. *E.g.*, Wis. Stat. §§ 227.52 (listing state administrative decisions not governed

tees the availability of judicial review, and provides that review will be available "promptly."[10]

2. THE TWO CONCERNS UNDERLYING THE "PROMPT JUDICIAL DETERMINATION" REQUIREMENT ARE INAPPOSITE HERE.

There is no basis to retreat from the view of the *FW/PBS* plurality and extend the "prompt judicial determination" requirement to encompass appeals from municipal licensing rulings. This Court adopted that requirement not because the First Amendment guarantees an adult business the right to engage in expression until a court rules to the contrary, as Petitioner mistakenly suggests, but rather as a prophylactic measure. Two specific concerns underlie the Court's decisions. First, absent a guarantee of a prompt judicial determination, exhibitors could engage in self-censorship, deterred from presenting their works to censors in the first instance. Because the administrative process must not "have a discouraging effect on the exhibitor," "the procedure must * * * assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Freedman*, 380 U.S. at 59; see also *Southeastern*

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by review procedures of the State Administrative Procedure Act), 893.80(4) (providing that no suit can be brought against certain municipal officers, agents or employees "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions"). See also *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (invalidating statute that failed to provide any avenue for judicial review).

[10] The judicial review procedures of WMC § 8.195 are at least as solicitous of the interests of adult businesses as those provided by other municipalities. Accepting Petitioner's argument accordingly would cut a very wide swath through the administrative practice of virtually every city and town in the country. See, *e.g.*, Alpharetta, GA Mun. Ord. 12-126 to -129; Anchorage, AK Code § 10.40.050(I), (L); Brownwood, TX Mun. Ord. § 158.508; Duluth, GA Code ch. 7, art. 14, §§ 7-605, 7-616 to -625; Duluth, MN Code ch. 5, art. IV, §§ 5-19, -22; Springdale, OH Mun. Ord. § 120.14.

Promotions, 420 U.S. at 561 ("And if judicial review is made unduly onerous, by reason of delay or otherwise, the board's determination in practice may be final."). Second, censors would be prone to determining erroneously that expression was not constitutionally protected, an inquiry that lies within the unique provenance of the courts. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman*, 380 U.S. at 58; see also *Southeastern Promotions*, 420 U.S. at 560-61 ("An administrative board assigned to screening state productions – and keeping off stage anything not deemed culturally uplifting or healthful – may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression.").

Petitioner cannot establish that either of the concerns that underlie the "prompt judicial determination" requirement is present in this context, in which a municipality does not purport to make any determination regarding whether expression is constitutionally protected and in fact provides substantial procedural protections throughout the administrative process (including, but hardly limited to, the availability of prompt judicial review).

a. Self-censorship.

An ordinance such as WMC § 8.195 does not present the risk that an applicant will be deterred from pursuing a license. As the plurality opinion in *FW/PBS* squarely concludes, "The license applicants * * * have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." 493 U.S. at 229-30. Compare *Freedman*,

380 U.S. at 59 ("The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation."). Indeed, Petitioner seems to recognize that an adult business will have extraordinary incentives to pursue both administrative and judicial review: "under a licensing scheme not just one or a few expressive works are at stake, but rather an entire ongoing" enterprise. Pet. Br. 35.

Numerous aspects of WMC § 8.195 confirm the conclusion of the *FW/PBS* plurality that adult businesses will not be deterred from applying to renew their licenses by the absence of a guaranteed "prompt judicial determination." Not only do adult businesses have a great economic stake in applying for renewal because an entire commercial enterprise rather than a single film is at stake, but the great bulk of the legal and factual development in the licensing process occurs, and the attendant costs are incurred, at the administrative – rather than judicial – level. Evidence is collected and witnesses are called only before the Common Council and the Appeals Board; the reviewing court is limited to determining whether the existing record provides substantial evidence for the City's decision not to renew a license. Pet. App. 8a. In addition, the only direct out-of-pocket cost – preparation of the record – must be borne by the City. Wis. Stat. § 68.13(2). The adult business knows that the burden of proof at the administrative stage will be on the City and that the City may not during the administrative proceedings challenge a ruling in the business's favor. Pet. App. 80a-81a. The ordinance also guarantees that the City will complete its review of the application both as an initial matter and on appeal in less time – fifty-one days – than the minimum time required to submit the application – sixty days – at which point immediate access to the courts is available. See *supra* at 8.

Just as important, an applicant can seek immediate relief from the court in the form of an order restraining termination of its license. Specifically, it may request "temporary relief pending disposition of the action or proceeding." Wis. Stat.

§ 781.02; see also *id.* § 813.02(1)(a) ("a temporary injunction may be granted"). Of note, the most rigorous element of the injunctive relief test – irreparable injury – is established by either a prohibition on protected expression (such as a license denial) or a showing that the failure to grant an injunction would render the permanent relief sought irrelevant (as when a business could show that it will be forced permanently out of business). *Werner* v. *A.L. Grootemaat & Sons*, 259 N.W.2d 310, 313-14 (Wis. 1977); *Elrod* v. *Burns*, 427 U.S. 347, 372 (1976).[11] Furthermore, if the trial court unduly delays deciding the case, the applicant may secure a writ of mandamus compelling the issuance of a ruling. *State ex rel. Fireman's Fund Ins. Co.* v. *Hoppmann*, 240 N.W. 884 (Wis. 1932).

For all of these reasons, it is quite unlikely that a putative applicant would conclude that the failure to provide a definite schedule under which a court will rule on an appeal from a licensing determination so infects the licensing process with indeterminacy that it simply is not worth the bother of applying at all.[12]

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[11] *Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (1975), is not to the contrary. In that case, the court held that the availability of interim judicial relief did not provide sufficient procedural protections to satisfy the First Amendment when the underlying administrative proceedings involved an inquiry into the *content* of the plaintiff's production. *Id.* at 562. Injunctive proceedings in that context impermissibly imposed on the applicant the burdens of proceeding in court and persuading the judge to issue an injunction. *Id.* But as the plurality held in *FW/PBS*, an applicant for a license to operate an adult business may be required to carry both those burdens. 493 U.S. at 230.

[12] There may be rare cases in which the costs of pursuing judicial review will prove too great for an adult business to bear. See Pet. Br. 45. But that does not justify a *per se* rule prohibiting the termination of a license pending judicial determination. Instead, the relevant inquiry is whether the review scheme is such that the busi-

b. Judicial expertise.

Nor is a "prompt judicial determination" necessary as a prophylactic measure on the theory that courts, rather than municipalities, are uniquely suited to making the kind of licensing determination at issue in this case. At the outset, it is important to note that the Waukesha ordinance plainly provides the right to appeal a licensing decision in court upon the conclusion of administrative proceedings. Absent delays by the applicant, an appeal therefore will be available before the expiration of the applicant's license. The question accordingly is not whether judicial review should be *available*, but instead whether the courts are so singularly suited to making licensing determinations that the First Amendment compels deviating from the normal processes of judicial review.

The courts simply do not have such special expertise in this context. To the contrary, the criteria for a license renewal are entirely content neutral and within the traditional realm of municipal expertise. Unlike the content-based censorship schemes in *Freedman* and its progeny, WMC § 8.195 calls on the City to make determinations that have nothing to do with whether City News & Novelty is selling constitutionally protected expressive materials. Instead, the ordinance requires a

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ness will be deterred from applying for renewal in the first instance. Petitioner's much broader reading of the First Amendment would mean that adult businesses could not be closed even pending appeal in the courts – because they may not be able to afford those costs either – and (as we discuss below) would apply equally to prevent closure pending judicial review based on the adult business's failure to comply with innumerable generally applicable laws, such as the failure to pay taxes or to maintain sanitary conditions. Cf. *Young* v. *American Mini Theatres*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. * * * At most the impact of the ordinance on these interests is incidental and minimal.").

determination whether, for example, minors were on the premises of City News & Novelty and whether its customers were engaging in sex acts on the premises. The City thus enacted WMC § 8.195 with "neither the purpose or effect of imposing a limitation or the restriction on the content of any communicative materials," but instead to "combat and curb the adverse secondary effects brought on by adult oriented establishments." Pet. App. 97a. As this Court held in *City of Renton* v. *Playtime Theatres*, those are matters of municipal concern and expertise. 475 U.S. 41, 50 (1986); see also *State ex rel. Ruffalo* v. *Common Council of the City of Kenosha*, 157 N.W.2d 568 (Wis. 1968) (sustaining tavern license revocation on basis of secondary effects). Accord *Graff* v. *City of Chicago*, 9 F.3d 1309, 1333 (CA7 1993) (en banc) (Flaum, J., concurring) ("Clearly included among such nonthreatening schemes are those that only ask and allow administrators to make the kind of determinations for which they are especially suited; *e.g.* questions about city aesthetics, traffic flow or City Code violations. Certainly, the Ordinance is in that category of innocuous schemes which a specially mandated judicial review mechanism would only hamper through inappropriate and inefficient second-guessing of legitimate administrative decisions.").

The fact that violations of Section 8.195 may result in closure of an adult business does not render the ordinance a content-based speech restriction requiring an immediate determination on appeal. In *Arcara* v. *Cloud Books*, in which this Court approved the use of a nuisance action to close an adult bookstore, this Court rejected the adult business's argument that "the effect of the statutory closure remedy impermissibly burdens its First Amendment protected bookselling activities." 478 U.S. 697, 706 (1986). The Court explained that "this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," as when money that otherwise would be spent on advertising must go to pay a

civil damages award and when a thief who would otherwise publish is sent to prison. *Id.* Thus, "the imposition of the closure order has nothing to do with any expressive conduct at all." *Id.* at 706 n.2; see also *id.* at 707 ("The legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity."). Justice O'Connor similarly explained in her concurring opinion that "[a]ny other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Id.* at 708.

Relatedly, Waukesha's interest in enforcing the ordinance "is unrelated to the suppression of free expression." *Barnes* v. *Glen Theatre*, 501 U.S. 560, 570 (1991) (Rehnquist, C.J., joined by O'Connor and Kennedy, JJ.); *id.* at 572 ("The statutory prohibition is not a means to some greater end, but an end in itself."); *id.* at 575 n.3 (Scalia, J., concurring) ("A law is 'general' for the present purposes if it regulates conduct without regard to whether that conduct is expressive."). Instead, the ordinance seeks only to eliminate "the secondary effects of such theaters on the surrounding community," which is a "vital governmental interest[]." *City of Renton* v. *Playtime Theatres*, 475 U.S. 41, 47, 50 (1986); see also *City of Erie* v. *Pap's A. M.*, 120 S. Ct. 1382, 1395 (2000) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.) ("efforts to protect public health and safety are clearly within the city's police powers"); *Barnes* v. *Glen Theatre*, 501 U.S. 560, 568 (1991) (Rehnquist, C.J., joined by O'Connor and Kennedy, JJ.) ("[T]he statute's purpose of protecting societal order and morality is clear from its text and history."); *id.* at 569 ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." (citing *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973))); *Young* v. *American Mini Theatres*, 427 U.S.

50, 80 (1976) (Powell, J., concurring) ("Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values.").[13]

Even more directly than in *City of Erie* v. *Pap's A. M.*, in which the Court sustained an ordinance banning public nudity that effectively prohibited totally nude dancing and admittedly "may not greatly reduce these secondary effects," the Waukesha ordinance is thus valid because it "is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments * * * and not at suppressing [any] message." 120 S. Ct. 1382, 1392, 1397 (2000) (opinion of O'Connor, J., joined by

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[13] Well-reasoned opinions of the courts of appeals support the same conclusion. *E.g.*, *TK's Video* v. *Denton County, Tex.*, 24 F.3d 705, 707 (CA5 1994) (per Higginbotham, J.) ("The order, by its own terms, combats pernicious side effects of adult businesses such as prostitution, disease, street crime, and urban blight. It does not censor, prevent entrepreneurs from marketing, or impede customers from obtaining communicative material."); *Graff* v. *City of Chicago*, 9 F.3d 1309, 1331 (CA7 1993) (en banc) (Flaum, J., concurring) ("Moreover, uncritically extending *Freedman*'s reach to strike down the Ordinance for lack of judicial review, by attributing broad significance to language in later cases that dealt with schemes substantially dissimilar from the one at issue here, would embark us upon a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny; for neither the purpose nor effect of the Ordinance, unlike the laws challenged in that line of cases, is to involve the licensor in any decisionmaking of constitutional proportion."); *id.* at 1335 (Ripple, J., concurring) ("The concerns the Court voiced in * * * *FW/PBS* are not present here. The Chicago ordinance sets forth criteria according to which a permit must be evaluated. Furthermore, there is a time limit within which city officials must respond to the application. In no way does the ordinance place unfettered discretion in the hands of city officials. As a result, there is no risk of either hidden or self censorship.").

Rehnquist, C.J., and Kennedy and Breyer, JJ.). Here, as there, "[t]he State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood." *Id.* at 1393. The First Amendment accordingly gives municipalities a "freer hand" in this area. *Id.* at 1396 (citing *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989)).[14]

Several other aspects of the administrative process guaranteed by WMC § 8.195 minimize the risk of an erroneous determination prejudicing an adult business. As the lower courts squarely held, the criteria for renewal set forth in the ordinance are clear and objective. Pet. App. 15a, 59a. The adult business has the right not only to submit evidence and legal argument, but also to call, subpoena, and cross-examine witnesses. Wis. Stat. § 68.11(2); WMC § 2.11(3). (Petitioner's statement that "the ordinance does not provide any tools of discovery by which the licensee can challenge the credibility of the witnesses against him or her," Pet. Br. 38, is thus simply wrong.) The adult business, but not the City, may appeal licensing determinations at any stage of the administrative process, and is assured that the administrative review will conclude prior to the expiration of its license. Indeed, the adult business has the right to select (as City News & Novelty did in this case) to pursue not just one but *two* administrative

[14] The fact that WMC § 8.195 is directed only at the secondary effects of adult businesses rather than the expressive nature of their wares is of course relevant for another important reason as well. This Court's precedents firmly establish that such a content-neutral regulation – unlike, for example, the censorship schemes in *Freedman* and *Southeastern Promotions* – presents far fewer risks that the government will seek to suppress unpopular speech. *Turner Broadcasting Sys.* v. *FCC*, 520 U.S. 180, 213 (1997).

appeals before impartial decisionmakers prior to proceeding to court.

As a matter of both expertise and separation of powers, the Wisconsin courts thus quite properly apply a deferential standard of review in reviewing a licensing determination. In a certiorari action, the court does not take new evidence or reach de novo factual conclusions. Instead, it reviews the administrative record to determine whether the municipality's factual determinations are supported by substantial evidence, Pet. App. 8a, the standard traditionally applied when the judiciary recognizes that another body has the expertise to reach factual conclusions and that the role of the courts is to check capricious administrative action. The court also confirms that the municipality's determinations were not "arbitrary, oppressive or unreasonable," *id.*, again inquiries that bespeak deference rather than judicial expertise. Cf. *Chevron U.S.A.* v. *NRDC*, 437 U.S. 837 (1984).[15]

To be sure, the judiciary has expertise superior to a municipality in one respect: resolving constitutional challenges to the ordinance itself, as opposed to the fact-bound inquiries into the adult business's compliance with the ordinance. But the exhaustion requirements of Section 8.195 do not apply to constitutional challenges and, indeed, such challenges cannot even be brought in the administrative process. Pet. App. 56a (citing *Kmiec* v. *Town of Spider Lake*, 211 N.W.2d 471, 473-74 (Wis. 1973)). As Petitioner's own *amici* recognize, "All

[15] Contrary to Petitioner's suggestion, Br. 35, this case is not akin to *Southeastern Promotions* v. *Conrad*, in which municipal officials were called upon to engage in the "appraisal of facts, the exercise of judgment, and the formation of an opinion." 420 U.S. 546, 554 (1975) (quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940)). As the Court explained in an accompanying footnote, the appraisals, judgments, and opinions in *Southeastern Promotions* related to "the *content* * * * of the production." *Id.* 554 n.7 (emphasis added).

litigants possess the right to challenge a statute – even if it does not impose a prior restraint – on constitutional grounds," by filing a plenary action in court. Liberty Project Br. 13 n.5. Petitioner is therefore wrong in arguing that in the case of such a constitutional challenge the ordinance "forces the denied applicant to sink valuable time and energy into a pointless effort, and works a postponement of the only review that can provide relief, judicial review." Pet. Br. 39-40.

Specifically, an adult business has at least two avenues to bring such a constitutional challenge directly in court without any delay whatsoever. City News & Novelty has in fact used *both* avenues to challenge WMC § 8.195, although it does not acknowledge either in its brief. First, an adult business can bring a declaratory judgment action in state court. See Wis. Stat. § 806.04. Thus, in 1990, City News & Novelty brought such an action challenging the constitutionality of Section 8.195's requirement that booths for viewing adult films have open entrances. See Resp. Lodging, vol. I, tab 15. Waukesha prevailed in both the trial and appellate courts. See *City News & Novelty, Inc.* v. *City of Waukesha*, 487 N.W.2d 316, 317 (Wis. Ct. App. 1992). Second, an adult business can bring an action in federal court under 42 U.S.C. § 1983. See generally *Patsy* v. *Board of Regents*, 457 U.S. 496, 500-01 (1982) (no administrative exhaustion requirement applies to Section 1983 actions); see also Wis. Stat. § 68.01 (remedies under statutory scheme "shall not be exclusive"). Indeed, while the administrative proceedings were pending *in this very case*, City News & Novelty brought such a suit in the Eastern District of Wisconsin raising a variety of constitutional challenges to WMC § 8.195. See Resp. Lodging, tab 16. Immediately after the case was assigned to a district judge, Petitioner elected to voluntarily dismiss its suit and to bring all

those claims on appeal from the City's subsequent licensing determination.[16]

3. PETITIONER'S REMAINING ARGUMENTS ARE UNAVAILING.

The various reasons asserted by Petitioner for adopting a mandatory stay of licensing determinations in fact support only the *availability* of judicial review, which WMC § 8.195 indisputably provides. Petitioner's arguments do not justify disabling a municipality's orderly implementation of a duly rendered determination that an adult business is, for reasons entirely unrelated to the nature of its expression, not entitled to a license to operate. For example, Petitioner maintains that the grounds invoked by the municipality may not be sufficient, as a constitutional matter, to justify the sanction of closure. But as we explained *supra* at 37-38, a licensee may at any time go directly to court to bring a facial challenge to the grounds that will justify nonrenewal. Even more important for present purposes, Petitioner's arguments simply establish that in this area, like all others, a municipality may make a mistake that should be subject to judicial review.

Petitioner's remaining arguments rest on a series of insupportable, gratuitous insults regarding the fidelity of every level of municipal government to the Constitution and to the rule of law. Without citation to a wisp of support, much less actual record evidence, Petitioner maintains that the Constitution requires constant judicial superintendence over local decisionmaking because municipal officials are "institutionally

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[16] Exhaustion of administrative remedies is also not required if a business seeks to contest the City's determination that it must have a license to operate. And the licensing ordinance would be entirely inapplicable if an adult business located in Waukesha sought to sell products through the Internet or by telephone. If an adult business has no storefront visited by customers, the risks of secondary effects are reduced. Accordingly, Respondent does not read WMC § 8.195 to apply in that situation.

more concerned with enforcement than with protecting constitutional rights" and "disregard[] all constitutional protections." Pet. Br. 32, 34.

The point need not be belabored. It is enough here to note the clear and uncontradicted record in this case, in which Waukesha officials accommodated every conceivable request by City News & Novelty and, indeed, agreed not to withdraw Petitioner's license until its constitutional challenge was addressed in the state circuit court. Here, as in *Arcara* v. *Cloud Books*, "there is no suggestion on the record before us that the closure of respondents' bookstore was sought under [ordinance] as a pretext for the suppression of First Amendment protected material." 478 U.S. 697, 707 (1986). Any such allegation would, in any event, be brought instead as "a claim of selective prosecution." *Id.* (citing *Wayte* v. *United States*, 470 U.S. 598 (1985)); see also *id.* (O'Connor, J., concurring) (concluding that it would be improper to rest decision on unsupported allegations of bias because "there is no suggestion in the record or opinion below of such pretextual use of" nuisance statute).

4. ACCEPTING PETITIONER'S ARGUMENT WOULD CAUSE SUBSTANTIAL, UNWARRANTED HARM TO IMPORTANT MUNICIPAL AND JUDICIAL INTERESTS.

There are additional important reasons for not extending the "prompt judicial determination" requirement into the context of content-neutral municipal licensing schemes. Cases such as *Freedman* and *Southeastern Promotions* focused on the interests of speakers because a "prompt judicial determination" requirement did not involve any risk that the public interest or the operation of the courts would be undermined. Not so here. Petitioner's theory, if accepted, would seriously interfere with municipalities' efforts to combat the secondary effects of adult businesses. See *City of Erie*, 120 S. Ct. at 1396 ("the government should have sufficient leeway to justify such a law based on secondary effects"); *Young* v. *American Mini Theatres*, 427 U.S. 50, 71 (1976) (city's interest in combating secondary effects is "one that must be accorded high respect"). Moreover, because Petitioner's argument would apply to every kind of regulation of every kind of expressive business, it would flood local courts with claims that as a federal constitutional matter must be given "first priority."

Moreover, on Petitioner's view, the Constitution grants an adult business a *per se* right to operate until a court says otherwise. Petitioner thus seeks a radical expansion of the *Freedman* line of cases. The most that the Court has ever required is a "prompt judicial determination" on review of an act of censorship. It has never required, as Petitioner urges, that the government "stay" implementation of its decision pending a ruling by the courts. Here, by contrast, Petitioner contends that the City's determination that, for reasons totally unrelated to the content of any speech, City News & Novelty is not entitled to an adult-business license must be stayed until a Wisconsin circuit court confirms that substantial evidence supports the City's determination that City News & Novelty had engaged in the nine different ordinance violations that were established in the administrative proceedings. (That notwithstanding that several of the violations were proven by sworn testimony of police officers, while others were duly confirmed by convictions of officers of City News & Novelty for ordinance violations.) In the meantime, the City's substantial interest in enforcing its laws, and specifically in avoiding the secondary effects of adult businesses, would be substantially undermined.

When targeted efforts to combat secondary effects fail – as in this case, in which Petitioner violated WMC § 8.195 and the City found minors on Petitioner's premises and customers committing sex acts on the premises – the municipality has an obligation to withdraw the adult business's license to operate. On Petitioner's alternate view, the business effectively has a free pass to violate the law, knowing that it cannot be closed until not only the administrative but also the judicial process

is completed. It therefore is not true, as Petitioner maintains, that "[w]ith a guaranteed stay throughout the first level of judicial review, * * * the City's inability to control the pace of litigation in the circuit court, which the court below found determinative, ceases to be a concern." Pet. Br. 47 (emphasis omitted).[17]

The total illogic of Petitioner's reading of *Freedman* and its progeny is also plain when it is applied to the context of an initial application for a license to operate. Such putative licensees have every much as great a First Amendment interest as existing adult businesses. If Petitioner is correct that an adult business will be deterred by the prospect of having to proceed through the administrative and judicial processes without a license to operate, then presumably a municipality must grant a license to everyone who requests one until a court says otherwise. But that simply cannot be the case.

The awesome expanse of Petitioner's proposed holding makes these concerns graver still. If adopted, the same rule would necessarily apply to all other content-neutral regulations. Zoning is the most obvious, as when a City seeks to restrict adult businesses to a particular area or class of property. But it is hard to see how the government could close an adult business for violating *any* of innumerable, generally ap-

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[17] It is for this reason that Petitioner is also wrong to argue that a municipality may, in certain limited and extremely urgent circumstances, bring a state-law nuisance action in an attempt to close an adult business. Pet. Br. 41-42. The First Amendment does not impose such an obligation on a municipality. Instead, if an adult business can make a sufficient showing that the administrative licensing determination was erroneous, it may (as was explained *supra*) secure an order restraining the City from terminating the license. Neither logic nor precedent requires that a municipality indefinitely stay its hand in this manner. Indeed, the plurality opinion in *FW/PBS* squarely held that a municipality need not bear the burden of going to court simply to deny a license application. 493 U.S. at 230.

plicable laws. *E.g.*, Wis. Stat. § 134.71 (requiring dealers in second-hand goods, who frequently resell books and movies, to be licensed as measure designed to combat sale of stolen property). Thus, nothing in the First Amendment calls for more prompt or searching judicial review of a municipal determination that minors were found on the premises of an adult business, see WMC § 8.195(10)(c), than determinations under the tax code or the sanitation laws. Cf. *California* v. *Grace Brethren Church*, 457 U.S. 393, 417 n.36 (1982). Of equal concern, the same broad prohibition on closure would also apply, *a fortiori*, to every other kind of expressive business, including publishers, newsstands, movie theaters, and video rental stores, effectively working a wholesale transfer of this fundamental area of municipal control to the state courts. *E.g.*, *Graff* v. *City of Chicago*, 9 F.3d 1309 (CA7 1993) (en banc) (applying *Freedman* and *FW/PBS* to licensing scheme for newsstands); cf. *Young* v. *American Mini Theatres*, 427 U.S. 50, 62 (1976) (although "adult films may only be exhibited commercially in licensed theaters," "that is also true of all motion pictures"). Petitioner's argument also would apply not just to purely adult businesses, but also to those that, like City News, sell many other products such as drug paraphernalia.

Finally, Petitioner's proposed rule would create a perverse and counterproductive set of incentives in all these areas. License applicants would invariably seek to delay the administrative process, safe in the knowledge that they will have a constitutional right to operate until the case is eventually decided in court. In this case, for example, once Waukesha announced that it would not withdraw City News & Novelty's license pending judicial review (equivalent to the mandatory stay Petitioner urges this Court to adopt), Petitioner engaged in a variety of delay tactics, both on administrative appeal and in court. See *supra* at 11-12. At the very least, any applicant that ever considered not filing a judicial appeal would certainly do so if Petitioner's approach were adopted, seriously

overburdening the courts. Furthermore, Petitioner's proposed rule would give municipalities a substantial incentive to provide fewer procedural protections to license applicants in order to move the matter immediately into court, shortening administrative hearings and opportunities for briefing. That is a particular problem when, as in Wisconsin, a reviewing court must consider the matter based exclusively on the record developed in the administrative proceedings. Pet. App. 8a.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Wisconsin should be affirmed.

Respectfully submitted,

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Dated: October 26, 2000

APPENDIX

8.195 Adult Oriented Establishments

(Preamble to Sec. 8.195 Rep. & Recr. #28-95) WHEREAS, it is a lawful purpose of the Common Council for the City of Waukesha to enact regulatory ordinances protecting and promoting the general welfare, health and safety of its citizens; and

WHEREAS, the City is empowered to enact such ordinances pursuant to the Constitution and Laws of the State of Wisconsin; and

WHEREAS, the Common Council, based on the experience of other cities including Seattle and Renton, Washington, and Detroit, Michigan, has previously determined as set forth in sec. 22.50 of the Waukesha Municipal Code that adult oriented establishments can contribute to the impairment of the character and quality of surrounding residential neighborhoods, and contribute to the decline and the value of surrounding properties; and

WHEREAS, further studies in other communities across the United States such as St. Paul, Minnesota; Indianapolis, Indiana; Austin, Texas and Phoenix, Arizona have documented that the secondary effects of adult oriented establishments affect property values, contribute to physical deterioration and blight, have a deleterious effect on both existing businesses around them and surrounding residential areas, including increased transiency, increased levels of criminal activities including prostitution, rape, assaults and other sex related crimes; and

WHEREAS, the Common Council believes that the experiences and studies of other communities set forth herein are relevant in addressing the secondary effects adult oriented establishments can have upon areas surrounding such establishments in the City of Waukesha; and

WHEREAS, many adult oriented establishments install booths with doors in which patrons can view adult oriented movies or video tapes or films or view other forms of adult entertainment; and

WHEREAS, it is has been found in Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana, to name a few locales, that the viewing booths in adult oriented establishment have been and are being used by patrons of said establishments for engaging in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation and masturbation, resulting in unsafe and unsanitary conditions in said booths; and

WHEREAS, Acquired Immune Deficiency Syndrome (AIDS) is a sexually transmitted disease which destroys the body's immune system, is always fatal, and has no known cure; and

WHEREAS, when this ordinance was originally enacted in 1989, statistics from the State of Wisconsin had indicated that as of July 25, 1986, 96 cases of AIDS were reported in the State including 54 that resulted in death and that Wisconsin could expect a ten fold increase in reported cases between 1986 and 1991; and

WHEREAS, as of January 1, 1995, the State of Wisconsin Department of Health and Social Services, Division of Public Health is projecting between 900-1300 new cases of AIDS during 1995 and 1996.

WHEREAS, the viral agents responsible for AIDS and other sexually transmitted diseases have all been isolated at one time or another from semen; and

WHEREAS, the City of Waukesha desires to combat and curb the adverse secondary effects brought on by adult oriented establishments and to protect the health, safety, and welfare of its citizens from increased crime, and to preserve and stabilize the neighborhoods of the City of Waukesha, and

to minimize the transmission of sexual diseases including AIDS; and

WHEREAS, although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments including, but not limited to, adult bookstores, adult mini-motion picture establishments, adult motion picture theaters and adult cabarets to combat and curb the secondary effects of such establishments.

NOW, THEREFORE, the Common Council of the City of Waukesha do ordain as follows:

ADULT ORIENTED ESTABLISHMENTS.

(1) DEFINITIONS:

Adult Bookstore. An establishment which has a facility or facilities, including but not limited to booths, cubicles, rooms or stalls, for the presentation of "adult entertainment", as defined below, including adult oriented films, movies or live performances for observation by patrons therein; or an establishment having as a substantial or significant portion of its stock in trade, for sale, rent, trade, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities as defined below.

Adult Cabaret. A cabaret which features topless dancers, strippers, male or female impersonators or similar entertainers.

Adult Entertainment. Any exhibition of any motion picture, live performance, display or dance of any type, which has as its dominant theme or is distinguished or characterized by an emphasis on any actual or simulated

specified sexual activities or specified anatomical areas as herein defined.

Adult Mini-Motion Picture Theater. An enclosed building with a capacity of less than 50 persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as herein defined for observation by patrons therein.

Adult Motion Picture Theater. An enclosed building with a capacity of 50 or more persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as defined below for observation by patrons therein.

Adult Oriented Establishment. Any premises including, but not limited to, "adult bookstores", "adult motion picture theaters", "adult mini-motion picture establishments" or "adult cabarets." It further means any premises to which public patrons or members are invited or admitted and which are so physically arranged so as to provide booths, cubicles, rooms, compartments, or stalls separate from the common area of the premises for the purposes of viewing adult oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, whether or not such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect. "Adult Oriented Establishment" further includes without being limited to any "adult entertainment studio" or any premises that is physically arranged and used as such whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, modeling studio, or any other term of like import.

"Booths", "Cubicles", "Rooms", "Compartments" or "Stalls". Enclosures as are specifically offered to the public or members of an adult-oriented establishment for hire or for a fee as part of a business operated on the premises which offers as part of its business the entertainment to be viewed within the enclosure. This shall include, without limitation, such enclosures wherein the entertainment is dispensed for a fee, but a fee is not charged for mere access to the enclosure. However, "booth", "cubicle", "room", "compartment" or "stall" does not mean such enclosures that are private offices used by the owners, managers or persons employed on the premises for attending to the tasks of their employment, which enclosures are not held out to the public or members of the establishment for hire or for a fee or for the purpose of viewing entertainment for a fee, are not open to any persons other than employees; nor shall this definition apply to hotels, motels or other similar establishments licensed by the State of Wisconsin pursuant to Chapter 50 of the Wisconsin Statutes.

Council. The City Council for the City of Waukesha, Waukesha County, Wisconsin.

Operators. Any person, partnership, or corporation operating, conducting, maintaining or owning any adult-oriented establishment.

Specified Anatomical Areas.

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, and female breasts below the point immediately above the top of the areola.

2. Human male genitals in a discernible turgid state, even if opaquely covered.

Specified Sexual Activities. Simulated or actual:

1. Showing of human genitals in a state of sexual stimulation or arousal.

2. Acts of masturbation, sexual intercourse, sodomy, bestiality, necrophilia, sado-masochistic abuse, fellatio or cunnilingus.

3. Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

(2) LICENSE.

(a) Except as provided in subsection (d) below, from and after the effective date of this section, no adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.

(b) A license may be issued only for one adult oriented establishment located at a fixed and certain place. Any person who desires to operate more than one adult oriented establishment must have a license for each.

(c) No license or interest in a license may be transferred to any person.

(d) All adult oriented establishments existing at the time of the passage of this section must submit an application for a license within 60 days of the passage of this section.

(3) APPLICATION FOR LICENSE.

(a) Any person desiring to secure a license shall make application to the City Clerk. The application shall be filed in triplicate and dated by the City Clerk. A copy of the application shall be distributed promptly by the City Clerk to the City Police Department and to the applicant.

(b) The application for a license shall be upon a form provided by the City Clerk. An applicant for a license shall furnish the following information under oath:

1. Name and address.

2. Written proof that the individual is at least 18 years of age.

3. The address of the adult oriented establishment to be operated by the applicant.

4. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agents and the name and address of all shareholders owning more than 5% of the stock in such corporation and all officers and directors of the corporation.

(c) Within 21 days of receiving an application for a new license or an application to renew a license, the City Clerk shall notify the applicant whether the application is granted or denied.

(d) Whenever an application is denied, or a license is not renewed, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter in conformity with sec. 68.11(2), (3), Wis. Stats. A final determination stating the reasons therefore, together with a copy of any official recording or transcript of the hearing, shall be rendered within 20 days of the commencement of the hearing. Judicial review shall be governed by sec. 68.13, Wis. Stats.

(e) Failure or refusal of the applicant to give any information relevant to the application or his refusal or failure to appear at any reasonable time and place for examination under oath regarding such application or his refusal to submit to or cooperate with regard to any information required by this section shall constitute an admission by the applicant that he is ineligible for

such license and shall be grounds for denial thereof by the City Clerk.

(4) STANDARDS FOR ISSUANCE OF LICENSE. To receive a license to operate an adult oriented establishment, an applicant must meet the following standards:

(a) If the applicant is an individual:

1. The applicant must be at least 18 years of age.

2. The applicant shall not have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(b) If the applicant is a corporation:

1. All officers, directors, and stockholders required to be named under par. (3)(b) shall be at least 18 years of age.

2. No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(c) If the applicant is a partnership, joint venture or any other type of organization where 2 or more persons have a financial interest:

1. All persons having a financial interest in the partnership, joint venture or other type of organization shall be at least 18 years of age.

2. No person having a financial interest in the partnership, joint venture or other type of organization shall have been found to have violated any provision of this section within 5 years immediately preceding the date of the application.

(5) FEES. A license fee of $250 shall be submitted with the application for a license. If the application is denied, 1/2 of the fee shall be returned.

(6) DISPLAY OF LICENSE OR PERMIT. The license shall be displayed in a conspicuous public place in the adult-oriented establishment.

(7) RENEWAL OF LICENSE OR PERMIT.

(a) Every license issued pursuant to this section will terminate at the expiration of one year from date of issuance, unless sooner revoked and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed not later that 60 days before the license expires. The application for renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.

(b) A license renewal fee of $250 shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of $100 shall be assessed against any applicant who files for a renewal less than 60 days before the license expires. If the application is denied, 1/2 of the total fees collected shall be returned.

(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.

(d) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.

(e) In a zoning district in which a use licensed under this section is a nonconforming use under the zoning provisions of this code, no location or premises

for which a license has been issued shall be used as an adult oriented establishment for one year following the date the nonrenewal of the license takes effect. For purposes of this paragraph a nonrenewal of a license takes effect when the licensed premises ceases operations as an adult oriented establishment.

(8) REVOCATION OF LICENSE.

(a) The Council shall revoke a license or permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application or material facts were omitted from any application.

2. The operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section provided, however, that in the case of a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of 30 days if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge.

3. The operator becomes ineligible to obtain a license or permit.

4. Any cost or fee required to be paid by this Section is not paid.

5. Any intoxicating liquor or cereal malt beverage is served or consumed on the premises of the adult oriented establishment.

(b) The Council, before revoking or suspending any license or permit, shall give the operator at least

10 days written notice of the charges against him and the opportunity for a public hearing before the Council or its designated committee as provided herein. The Council or its designated committee shall provide a written determination whether to revoke or suspend the license or permit within five (5) days of the public hearing. Any appeal from the determination of the Council or its designated committee shall be taken pursuant to secs. 68.10-68.12, Wis. Stats.

(c) The transfer of a license or any interest in a license shall automatically and immediately revoke the license.

(d) Any operator whose license is revoked shall not be eligible to receive a license for one year from the date of revocation. No location or premises for which a license has been issued shall be used as an adult oriented establishment for six (6) months from the date of revocation of the license. In a zoning district in which a use licensed under this section is a nonconforming use under the zoning provisions of this code, no location or premises for which a license has been issued shall be used as an adult oriented establishment for one year following the date the revocation of the license takes effect. For purposes of this paragraph a revocation of a license takes effect when the licensed premises ceases operations as an adult oriented establishment.

(9) PHYSICAL LAYOUT OF ADULT ORIENTED ESTABLISHMENT. Any adult oriented establishment having available for customers, patrons or members, any booth, room or cubicle for the private viewing of any adult entertainment must comply with the following requirements:

(a) Access. Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult oriented establishment and shall be unob-

structed by any door, lock or other control-type devices.

(b) Construction. Every booth, room or cubicle shall meet the following construction requirements:

1. Each booth, room or cubicle shall be separated from adjacent booths, rooms or cubicles and any non-public areas by a wall.

2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same.

3. All walls shall be solid and without any openings, extended from the floor to a height of not less than 6 feet and be light colored, non-absorbent, smooth textured and easily cleanable.

4. The floor must be light colored, non-absorbent, smooth textured and easily cleanable.

5. The lighting level of each booth, room or cubicle, when not in use shall be a minimum of ten foot candles at all times, as measured from the floor.

(c) Occupants. Only one individual shall occupy a booth, room or cubicle at any time. No occupants of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

(d) Inspections. The Building Inspector shall conduct monthly inspections of the premises to insure compliance with the provisions of this subsection.

(10) RESPONSIBILITIES OF THE OPERATOR.

(a) Every act or omission by an employee constituting a violation of the provisions of this Section shall be deemed the act or omission of the operator is such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.

(d) The operator shall maintain the premises in a clean and sanitary manner at all times.

(e) The operator shall maintain at least 10 foot candles of light in the public portions of the establishment, including aisles, at all times. However, if a lesser level of illumination in the aisles shall be necessary to enable a patron to view the adult entertainment in a booth, room or cubicle adjoining an aisle, a lesser amount of illumination may be maintained in such aisles, provided, however, at no time shall there be less then one foot candle of illumination in said aisles, as measured from the floor.

(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.

(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

(12) PENALTIES AND PROSECUTION. Any person who shall violate any provisions of this Section or who shall fail to obtain a license or permit as required hereunder shall be subject to penalty as provided in §25.05 of this Municipal Code.

CHAPTER 68.

MUNICIPAL ADMINISTRATIVE PROCEDURE

68.001. Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

68.01. Review of administrative determinations. Any person having a substantial interest which is adversely affected by an administrative determination of a governing body, board, commission, committee, agency, officer or employee of a municipality or agent acting on behalf of a municipality as set forth in § 68.02, may have such determination reviewed as provided in this chapter. The remedies under this chapter shall not be exclusive. No department, board, commission, agency, officer or employee of a municipality who is aggrieved may initiate review under this chapter of a determination of any other department, board, commission, agency, officer or employee of the same municipality, but may respond or intervene in a review proceeding under this chapter initiated by another.

68.02. Determinations reviewable. The following determinations are reviewable under this chapter:

(1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.

(2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in § 68.03(5).

(3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.

(4) The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court.

68.03. Determinations not subject to review. Except as provided in § 68.02, the following determinations are not reviewable under this chapter:

(1) A legislative enactment. A legislative enactment is an ordinance, resolution or adopted motion of the governing body of a municipality.

(2) Any action subject to administrative or judicial review procedures under other statutes.

(3) The denial of a tort or contract claim for money, required to be filed with the municipality pursuant to statutory procedures for the filing of such claims.

(4) The suspension, removal or disciplining or nonrenewal of a contract of a municipal employee or officer.

(5) The grant, denial, suspension or revocation of an alcohol beverage license under § 125.12(1).

(6) Judgments and orders of a court.

(7) Determinations made during municipal labor negotiations.

(8) Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in § 68.16.

(9) Notwithstanding any other provision of this chapter, any action or determination of a municipal authority which does not involve the constitutionally protected right of a specific person or persons to due process in connection with the action or determination.

68.04. Municipalities included. "Municipality", as used in this chapter, includes any county, city, village, town, technical college district, special purpose district or board or commission thereof, and any public or quasi-public corporation or board or commission created pursuant to statute, ordinance or resolution, but does not include the state, a state agency, a corporation chartered by the state or a school district as defined in § 115.01(3).

68.05. Municipal authority defined. "Municipal authority" includes every municipality and governing body, board, commission, committee, agency, officer, employee, or agent thereof making a determination under § 68.01, and every person, committee or agency of a municipality appointed to make an independent review under § 68.09(2).

68.06. Persons aggrieved. A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination of a municipal authority.

68.07. Reducing determination to writing. If a determination subject to this chapter is made orally or, if in writing, does not state the reasons therefor, the municipal authority making such determination shall, upon written request of any person aggrieved by such determination made within 10 days of notice of such determination, reduce the determination and the reasons therefor to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and shall advise such person of the right to have such determination reviewed, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed.

68.08. Request for review of determination. Any person aggrieved may have a written or oral determination reviewed by written request mailed or delivered to the municipal authority which made such determination within 30 days of notice to such person of such determination. The request for review shall state the ground or grounds upon which the

person aggrieved contends that the decision should be modified or reversed. A request for review shall be made to the officer, employee, agent, agency, committee, board, commission or body who made the determination but failure to make such request to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.

68.09. Review of determination. (1) Initial determination. If a request for review is made under § 68.08, the determination to be reviewed shall be termed an initial determination.

(2) Who shall make review. A review under this section may be made by the officer, employee, agent, agency, committee, board, commission or body who made the initial determination. However, an independent review of such initial determination by another person, committee or agency of the municipality may be provided by the municipality.

(3) When to make review. The municipal authority shall review the initial determination within 15 days of receipt of a request for review. The time for review may be extended by agreement with the person aggrieved.

(4) Right to present evidence and argument. The person aggrieved may file with the request for review or within the time agreed with the municipal authority written evidence and argument in support of the person's position with respect to the initial determination.

(5) Decision on review. The municipal authority may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a copy of the municipal authority's decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken and the office or person with whom notice of appeal shall be filed.

68.10. Administrative appeal. (1) From initial determi-

nation or decision on review. (a) If the person aggrieved did not have a hearing substantially in compliance with § 68.11 when the initial determination was made, the person may appeal under this section from the decision on review and shall follow the procedures set forth in §§ 68.08 and 68.09.

(b) If the person aggrieved had a hearing substantially in compliance with § 68.11 when the initial determination was made, the person may elect to follow the procedures provided in §§ 68.08 and 68.09, but is not entitled to appeal under this section unless granted by the municipal authority. The person may, however, seek review under § 68.13.

(2) Time within which appeal may be taken under this section. Appeal from a decision on review under § 68.09 shall be taken within 30 days of notice of such decision.

(3) How appeal may be taken. An appeal under this section may be taken by filing with or mailing to the office or person designated in the municipal authority's decision on review, written notice of appeal.

68.11. Hearing on administrative appeal. (1) Time of hearing. The municipality shall provide the appellant a hearing on an appeal under § 68.10 within 15 days of receipt of the notice of appeal filed or mailed under § 68.10 and shall serve the appellant with notice of such hearing by mail or personal service at least 10 days before such hearing.

(2) Conduct of hearing. At the hearing, the appellant and the municipal authority may be represented by an attorney and may present evidence and call and examine witnesses and cross-examine witnesses of the other party. Such witnesses shall be sworn by the person conducting the hearing. The municipality shall provide an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal. The decision maker may issue subpoenas. An appellant's attorney of record may issue a sub-

poena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in § 805.07(4) and must be served in the manner provided in § 805.07(5). The attorney shall, at the time of issuance, send a copy of the subpoena to the decision maker. The hearing may, however, be conducted by an impartial person, committee, board or commission designated to conduct the hearing and report to the decision maker.

(3) Record of hearing. The person conducting the hearing or a person employed for that purpose shall take notes of the testimony and shall mark and preserve all exhibits. The person conducting the hearing may, and upon request of the appellant shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the municipality.

68.12. Final determination. (1) Within 20 days of completion of the hearing conducted under § 68.11 and the filing of briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.

(2) A determination following a hearing substantially meeting the requirements of § 68.11 or a decision on review under § 68.09 following such hearing shall also be a final determination.

68.13. Judicial review. (1) Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

(2) If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the

person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript. By stipulation, the court may order a synopsis of the proceedings in lieu of a transcript. The court may otherwise limit the requirement for a transcript.

68.14. Legislative review. (1) The seeking of a review pursuant to § 68.10 or 68.13 does not preclude a person aggrieved from seeking relief from the governing body of the municipality or any of its boards, commissions, committees, or agencies which may have jurisdiction.

(2) If in the course of legislative review under this section, a determination is modified, such modification and any evidence adduced before the governing body, board, commission, committee or agency shall be made part of the record on review under § 68.13.

(3) The governing body, board, commission, committee or agency conducting a legislative review under this section need not conduct the type of hearing required under § 68.11.

68.15. Availability of methods of resolving disputes. This chapter does not preclude any municipality and person aggrieved from employing arbitration, mediation or other methods of resolving disputes, and does not supersede contractual provisions for that purpose.

68.16. Election not to be governed by this chapter. The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.

(13)

Supreme Court, U.S.
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No. 99-1680

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Wisconsin

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ARGUMENT

I. THE PETITIONER'S PRAYER, THAT THIS COURT SHOULD HOLD § 8.195 (1995) INVALID ON ITS FACE, IS NEITHER MOOT, NOR WAIVED, NOR OUTSIDE THE SCOPE OF THE PETITION AS GRANTED.

A. This Case Is Not Moot.

1. Unless the Ordinance, as it stood in 1995, is declared void, the corporate Petitioner and all of its officers are guilty of having violated the Ordinance by operating without a license, and are disabled from licensure in Waukesha and elsewhere.

While it is true that the corporate Petitioner has promised to close the store at its current downtown location in Waukesha (Respondent's Lodging, Vol. I, Tab 14),[1] it has never promised not to apply for a license to open at a new location, in Waukesha or elsewhere, nor does it disavow an intent to do so.[2] As will be shown below, the decision here under review will continue to have a negative impact on the Petitioner by disqualifying it in

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[1] The Respondent filed a voluminous Lodging with its brief in this Court. Respondents' Lodging, Vol. 1, Tabs 14-16, includes pleadings from other litigation involving the Petitioner and correspondence between the parties from earlier this year. The Petitioner now submits its own, much slighter, lodging, with similar, judicially noticeable documents. The Petitioner has no objection to the Court taking judicial notice of the extra-record documents in the Respondent's Lodging, if it also considers those in the Petitioner's Lodging that complete the story.

[2] In *City of Erie v. Pap's A. M.*, 120 S. Ct. 1382 (2000), this Court held that the possibility that a party might wish to do business in a municipality, even though it disavows any intention to do so, is sufficient to save a once-ripe challenge to a municipal ordinance from Article III mootness.

connection with future license applications, and, accordingly, this case has not become moot.[3]

No individual may hold, or participate in holding, a license under the Waukesha ordinance for a period of five years after having violated it. WMC § 8.195(4), Pet. App. 103. The nonrenewal decision in this case was based on violations of the Ordinance in 1994, and 1995. Pet. App. 82-83. The § 8.195(4) disabilities from the violations upon which the nonrenewal was based will expire later this year. However, operating an adult oriented establishment without a license, as City News did for years after its nonrenewal, is also a violation of the Ordinance.[4] Unless the Ordinance is declared unconstitutional, the disabilities from licensure in Waukesha borne by City News and its officers as a result of this continuing violation will persist until February, 2005.[5] Other municipalities' licensing ordinances deny licenses to those whose licenses to

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[3] Before the agreement to close Petitioner's store, Petitioner filed an application for a new license on February 10, 2000. The February 10, 2000, application was rejected, in part, because of the disability flowing from the 1995 nonrenewal. *Id.* Petitioner's counsel's letter of June 12, 2000 (Respondent's Lodging, Vol. I, Tab 14), withdraws Petitioner's appeals from the rejection of that application, not the application at issue in this case, Petitioner's Lodging, Tab 8, and thus has no relevance to the standing issue here.

[4] The City's Resolution of May 7, 1996, permitted the Petitioner to operate only through review in the Circuit Court. Petitioner's Lodging, Tab 3. This concluded on April 7, 1997. Pet. App. 55. The City specifically rejected a suggestion by Petitioner that its operation thereafter be deemed lawful. Letter from Meitz to Olson, Feb. 4, 2000 (Petitioner's Lodging, Tab 7).

[5] From April 2, 1997, when the Circuit Court decision was handed down (Pet. App. 55) and the Petitioner's right to continue to operate conferred by the Council Resolution of May 7, 1996 expired (Petitioner's Lodging, Tab 3), until February 8, 2000, when the City amended its ordinance (*id.*, Tab 9) (six days before Petitioner ceased operating as an adult store, *id.*, Tab 7), the Petitioner was operating without a license in violation of the

operate adult businesses have been revoked or nonrenewed by any city, imposing civil disabilities of varying durations, and disabilities from licensure may persist after that. *See, e.g., Sibron v. New York*, 392 U.S. 40 (1968), in which the Court held that an appeal of a criminal conviction was not moot as to a defendant who had completed his sentence, because of the possibility of collateral consequences flowing from the conviction.[6]

2. In this review of an administrative decision, there is no basis for the Court to pass judgment on amendments to the Ordinance after the administrative decision under review.

Though it made no such suggestion in its Brief in Opposition to the Petition for Writ of Certiorari, the City of Waukesha now contends that this case is moot, because it has amended its ordinance. If this Court were to attempt to rule on the constitutionality of the present version of Waukesha Municipal Code (WMC) § 8.195, it would truly be aiming at a moving target. The ordinance was amended four times this year, on February 8, 2000 (after the Court of Appeals decision), on August 16, 2000 (after this Court granted certiorari), on September 20, 2000 (after Petitioner's brief was filed), and on November 10, 2000 (after Respondent's brief was filed). Petitioner's Lodging, Tab 9. Notwithstanding the City's determined efforts to shield the original ordinance from review by this Court, it is the version of the ordinance in effect at the time of the administrative decision under review that must control the result of this case, as shown below.

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original ordinance scheme reviewed by the courts below. On January 21, 2000, the City affirmatively warned Petitioner that it was operating without a license (*id.*, Tab 7).

[6] "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequence will be imposed on the basis of the challenged conviction." *Sibron*, 392 U.S. at 57.

If the original version of the Ordinance is constitutional, City News and all of its officers are disabled from any new licensure in Waukesha for five years. However, if it is facially invalid, they were entitled to violate it "with impunity." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). The unamended Ordinance controls on this point.

The City argues that, since the ordinance has, this year, been amended to remedy the lack of any time limit for a public hearing decision under § 8.195(3)(d), an applicant can now steer clear of the open-ended periods allotted for completing a public hearing and completing post-hearing briefing under the alternative Chapter 68 review scheme. Respondent's Brief at 24. This amendment is simply not relevant to this case, as the Petitioner is not now operating an adult business in Waukesha, and the validity of Petitioner's nonrenewal depends solely upon the renewal scheme in effect at the time of the nonrenewal ruling.

This court confronted a very similar question in *Massachusetts v. Oaks*, 491 U.S. 576 (1989). There, in a separate opinion by Justice Scalia, five Justices agreed that a subsequent narrowing amendment of a law could not render moot a claim that it was facially void when violated.

The City cites *Diffenderfer v. Central Baptist Church of Miami, Fla.*, 404 U.S. 412 (1972) (per curiam) for the proposition that the Court should look to the amended Ordinance, but in that case and all of the cases on which it relied, the plaintiffs sought prospective relief involving the future application of a statute. Here the Petitioner seeks no such relief, and prospective injunctive relief would not be available in a Chapter 68 review action such as this in any event. *Hanlon v. Town of Milton*, 2000 WI 61, 235 Wis.2d 597, 612 N.W.2d 44, 48 ¶ 16 (2000). The relief the Petitioner seeks is the vacation of the order denying renewal and the retrospective invalidation of the Ordinance as it stood when the Petitioner was violating it by operating without a license, in order to remove the disabilities flowing from the nonrenewal and from those

violations. If, however, the Court believes that the current version of the Ordinance is controlling, it should, as in *Diffenderfer*, remand so the Petitioner may, if it chooses, amend its complaint to challenge the amended ordinance, and the Wisconsin courts may then have the first opportunity to consider the effects of the amendments.

B. The Petitioner's Arguments Were Neither Waived Nor Outside The Petition.

City News' brief in the Wisconsin Court of Appeals explained the holding in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), and argued that the Ordinance failed to guarantee the right to prompt judicial review "under any interpretation of prompt judicial review." City News' Court of Appeals Brief at 22, quoting *Redner*, 29 F.3d at 1502. City News contended that "by the absence of a requirement of a decision following a public hearing within any certain period of time," Brief at 22, "judicial review is potentially unavailable for an extended period of time while the administrative review is still pending." Brief at 22, quoting *Redner*, 29 F.3d at 1502.

This argument went to § 8.195(3)(d) of the Ordinance, and the Court of Appeals agreed with it. Pet. App. 24-26. Then, in its Court of Appeals brief, City News went on to argue that WMC § 2.11, the City's generic administrative procedure ordinance, and Chapter 68, Wis. Stats. (Pet. App. at 61), which it adopts, "are insufficient for the purpose of providing 'prompt judicial review' *for the same reason*." Brief at 23 (emphasis supplied)[7]. *See also* City

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[7] The Wisconsin Court of Appeals' observation that the petitioner did not "directly challenge" Chapter 68 (Pet. App. 28), is quite misleading. The court merely noted that City News was not claiming ch. 68 was facially invalid in all its potential applications most of which do not involve permits to engage in First Amendment activity. *See* City News' Court of Appeals Brief at 12, 14, and 21-22, where City News objected to the adoption by reference of Chapter 68's open-ended review

News' Reply Brief in the Wisconsin Court of Appeals at 5-6, n. 1. The Court of Appeals understood this argument, clearly did not consider it waived, and rejected it on its merits. The Court said, "the primary method of review lies under ch. 68, Stats.," and ruled squarely, if incorrectly that ch. 68 "provides a fixed timetable" such that "judicial review may not be delayed for an indefinite period of time." Pet. App. 23.

Neither is the Petitioner's argument that a licensing ordinance must maintain the status quo through the first level of judicial review newly minted before this Court. Indeed, the Circuit Court analysed City News' challenge "for failure to preserve the status quo throughout the review process" (Pet. App. 60), and observed, "Time limits and status quo go hand in hand." Pet. App. 62. The Court of Appeals considered the question of maintenance of the status quo throughout administrative review so central to this case that it was one of the grounds upon which the court unsuccessfully attempted to certify the case to the Wisconsin Supreme Court. Pet. App. 44.

The time limits and status quo issues raised here were fairly included in the Petition for Certiorari. The Petition explained that, included within the question presented regarding "prompt judicial review" were both the

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procedures into municipal code provisions governing the renewal of licenses for protected expression.

Additionally, as noted in the Brief for the United States as Amicus Curiae, at 29, n. 15, Petitioner's counsel's letter after oral argument in the Court of Appeals (which was submitted *at the court's invitation*), again emphasized the open-ended structure of the ch. 68 procedures, focusing on a case, *Franken Equities v. City of Evanston*, 967 F. Supp. 1233 (D. Wy. 1997), that invalidated a licensing procedure because the hearing which it provided was of potentially indefinite duration. The oral arguments and this submission supplemented the briefing on lack of time limits in the Court of Appeals.

subsidiary question of effective time limits for the administrative review scheme as well as the issue of preservation of the status quo. *See*, Petition at 17.[8]

II. PETITIONER'S *FACIAL* CHALLENGE CANNOT BE DEFEATED SIMPLY BECAUSE THE CITY DID NOT APPLY ITS ORDINANCE UNCONSTITUTIONALLY.

As the courts below consistently recognized, the City's willingness to allow the Petitioner to operate pending judicial review in this one case cannot save its ordinance from facial review. Pet. App. 25, 60, 62.

In any event, a facial challenge to a licensing scheme that confers unbridled discretion is appropriate, and the option for unlimited delay is a form of unbridled discretion. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-224 (1990) (plurality opinion), this Court said that "where a scheme creates a risk of delay such that every application of the statute creates an impermissible risk of suppression of ideas, we have permitted parties to bring facial challenges" (internal quotation marks and citations omitted).

Finally, if both alternative judicial review provisions are invalidated, it is impossible to construe the balance of

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[8] The City is wrong in suggesting that built-in open-ended delays in its licensing scheme have nothing "to do with the actual question presented." Respondent's Brief at 24. If a business can be closed for an indefinite or lengthy period before city officials complete their administrative decisionmaking, judicial review cannot be deemed "prompt" in any constitutionally meaningful sense of that word. *See, e.g., Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994). This Court actually presaged the holding in *Redner* by observing in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990) (plurality opinion) that the ordinance there failed to provide an avenue for prompt judicial review because its administrative procedure lacked effective time limits.

the licensing requirement so that it survives,[9] and the Wisconsin courts on remand should then vacate the non-renewal order, and relieve the petitioner and its agents of the disability from licensure they currently bear for having had a license denied and for having operated without a license.[10]

III. IT IS PRECISELY BECAUSE A FACIALLY CONTENT-NEUTRAL LICENSING SCHEME CAN BE EMPLOYED TO EFFECT CONTENT-BASED CENSORSHIP BY DELAY THAT THIS COURT HAS REQUIRED PROCEDURAL SAFEGUARDS INCLUDING PRESERVATION OF THE STATUS QUO.

The City's primary argument on the merits is that the requirements of *Freedman*[11] and *Southeastern Promotions*,[12] including that the status quo be maintained through judicial review, apply only to governmental speech-licensing schemes that are expressly content-based, that is, schemes that license only a particular book, film or performance, and unabashedly allow for licensing decisions based on content. This argument was considered by this Court and flatly rejected in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). In that case, this Court discussed the subject of which, if any, of the *Freedman* guarantees apply when the context of a licensing scheme switches from unapologetic

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[9] The Wisconsin Court of Appeals invalidated one of the 1996 Ordinance's paths to judicial review, § 8.195(3)(d), for want of a time limit. If this Court invalidates the other path (*i.e.*, the adoption in § 8.195(11) of Chapter 68 review), the 1996 Ordinance will lack any of the procedural safeguards required by *FW/PBS* and the renewal requirement would be facially invalid.

[10] Though the Ordinance's licensing provisions should fall, Wisconsin's courts might well sever and preserve the Ordinance's substantive provisions governing the operation of adult businesses, at §§ 8.195(9)-(10).

[11] *Freedman v. Maryland*, 380 U.S. 51 (1965).

[12] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

censorship to an annual licensing scheme for adult stores. It did not announce any relaxation of *Freedman*'s status quo preservation requirement. *Id.* at 228.

In *FW/PBS*, six justices of this Court agreed as to the application of certain of the *Freedman* procedural safeguards to adult business licensing laws.[13] One of these safeguards requires the preservation of the status quo. As noted in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975), "[w]e held in *Freedman*, and we reaffirm here, that . . . any restraint *prior to judicial review* can be imposed only for a specified period and *only for the purpose of preserving the status quo.*" (Emphases added.)

The plurality opinion by Justice O'Connor confirmed that this safeguard applies to the annual licensing of

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[13] The Brief of the National League of Cities and others, 17-22, misstates prior restraint analysis in the context of a challenge to a licensing scheme lacking *procedural* guarantees. Any enactment that requires permission from the government prior to engaging in speech is in fact a prior restraint. *FW/PBS* at 225; *and see, Alexander v. United States*, 509 U.S. 544, 553, n. 2 (1993). In *FW/PBS* this Court did not reach the question of whether the *substantive* provisions of the licensing scheme there, *i.e.*, the license requirement and its civil disability provisions, should be assessed under standards applicable to time, place and manner schemes, 493 U.S. at 223 (plurality opinion), because it invalidated the licensing scheme for its lack of *procedural* safeguards. The Court should do the same in this case, as it presents no challenge to the city's substantive authority to require that adult stores be licensed, nor to the substantive standards governing who gets a license (though these significant issues, which the Circuits are just now beginning to develop, will no doubt be raised in future cases). This Court has never suggested that the *Freedman procedural* safeguards are unnecessary in the context of a prior restraint merely because its substantive provisions may be content-neutral provisions aimed at secondary effects. *See, e.g., FW/PBS* (safeguards required in content-neutral adult-business licensing scheme).

adult businesses. The plurality enumerated the three *Freedman* safeguards in the following language:

> (1) any restraint *prior to judicial review* can be imposed only for a specified brief period *during which the status quo must be maintained*;
>
> (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS at 227 (emphasis added).

Then, in moving to the context of adult business licensing schemes, it said:

> Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period *during which the status quo is maintained*, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

FW/PBS at 228 (emphasis added).

While the status-quo-preservation language in *FW/PBS* is not precisely identical to the language in *Southeastern Promotions*, it is sufficiently similar that it would be unreasonable to interpret it as having intended any change in the nature of the requirement as articulated in *Southeastern Promotions*,[14] particularly given its

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[14] In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the Court said, that a prior restraint of speech may be imposed before the would-be speaker has the opportunity to obtain a judicial determination of its lawfulness *only* where the restraint has the effect of maintaining the status quo, *e.g.*, by restraining speech that has not yet commenced. Since a restraint in advance of judicial determination may be imposed when and only when it preserves the status quo, it necessarily follows that a restraint in advance of a judicial determination may not be

characterization as "essential" and the absence of any other discussion of the status quo point in the plurality opinion.

However, regardless of whether this Court looks to the promulgation of the status quo requirement as stated by the majority in *Southeastern Promotions*, or undertakes a creative reading of the language used by the plurality in *FW/PBS*, the ordinance challenged here cannot survive. Obviously, measured against the language used in *Southeastern Promotions*, the ordinance falls because it fails to preserve the status quo pending a judicial determination. Alternatively, even if the *FW/PBS* plurality deliberately intended to cut back on *Southeastern Promotions'* status quo requirement to only require preservation of the status quo pending completion of *administrative* review, the scheme under which Petitioner's license was denied readily fails that test as well. Due, at least in part, to its open-ended time limits for a final administrative decision, a business's right to operate could easily terminate long before completion of all diligently-pursued administrative review. In short, this scheme fails under any formulation of the status quo requirement, and the Court may not be compelled to address the broader question of whether a stay should remain in effect pending an initial judicial determination on the merits.

However, should the Court reach that question, it should hold that an annual licensing scheme for adult businesses must guarantee an unsuccessful applicant for renewal the preservation of the status quo through the first level of judicial review, as in *Freedman* and *Southeastern Promotions*.

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imposed where it would alter the status quo, *e.g.*, by terminating expressive activity already lawfully underway. In *Southeastern Promotions*, the Court summed up its holding by saying, "Procedural safeguards were lacking here in several respects," and then listed among them: "During the time prior to judicial determination, the restraint altered the status quo." 420 U.S. at 562.

This Court has consistently refused to dispense with time-honored procedural protections for First Amendment rights on the ground that the potential for unlawful suppression appeared in novel dress. "As far back as the decision in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720-721 (1931), this Court has recognized that the way in which a restraint on speech is "characterized" under state law is of little consequence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989).

The *FW/PBS* plurality recognized some differences between a censorship scheme and a licensing scheme, but appreciated their functional similarity, noting that "Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license." *FW/PBS* at 226.[15]

The City implicitly suggests that this Court should rewrite its licensing jurisprudence on the assumption that municipal officials will always act fairly, and that to suggest that their anti-pornography feelings might sway their judgment is a "gratuitous insult. . . . " Respondent's Brief at 39. This Court has previously rejected this suggestion, holding that a presumption that municipal licensing personnel will act in good faith and obey unwritten standards is "the very presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770

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[15] In a display of plain speaking rare among the Circuits in the context of licensing jurisprudence, the Seventh Circuit recently called the Dallas licensing scheme invalidated in *FW/PBS* a system of "quasi-censorship," and explained the result in that case by frankly admitting that government often has a content-based ax to grind against a sexually oriented business, even in the licensing context. *Thomas v. Chicago Park District*, ___ F.3d ___, ___ (Case No. 99-1811, 7th Cir. 2000).

(1988).[16] Though *Lakewood* involved only substantive discretion in licensing decisions, the analysis must be the same where, as here, a licensing scheme allows for procedural discretion. "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion).[17]

The reason for the status quo preservation requirement is to insure that licensing personnel (who need not be neutral quasi-judicial decision makers but can be, as here, local politicians sitting on the City Council) cannot unilaterally shut down existing businesses without some prior judicial approval of their decision. A single adult business can easily become one of the most highly charged political issues on a municipal landscape. The

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[16] The *potential* for biased or arbitrary administration of a licensing scheme, which arises from an enactment's lack of procedural safeguards, is all that is necessary to require its facial invalidation. " . . . [T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133, n. 10 (1992). *See also, Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

[17] This Court's requirement that licensing ordinances contain procedural safeguards to curtail discriminatory enforcement recognizes that, where procedural safeguards are lacking, and a municipality need not explain a subjective licensing decision or a delay in the review process that results in the closure of a business before it can get to court, it is easy for it to conceal any improper conduct or motives in any given case. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758, 759 (1988), where the Court acknowledged "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action," and *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132 (1992).

status quo guarantee is a crucial safeguard necessary for protecting First Amendment rights against those powers that are most politically motivated to engage in content-based censorship pretextually based on content-neutral reasons.

Beyond this, however, preservation of the status quo pending court review is critical, because city officials may deny a license based on criteria in an ordinance, which are, themselves, unconstitutional. Since city decision-makers typically have no power to rule on the constitutionality of the ordinances they administer, it is crucial that the status quo be preserved until at least one court has examined the merits of the revocation order and all of the licensee's related constitutional defenses.[18]

IV. ONE WHOSE LICENSE EXPIRES DURING ADMINISTRATIVE REVIEW DOES NOT HAVE EFFECTIVE AVENUES BY WHICH TO AVOID INJURY FROM WANT OF PROMPT AND EFFECTIVE JUDICIAL REVIEW.

The City asserts a renewal applicant can assure itself of at least a judicially reviewable administrative decision

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[18] For example, if the basis for a non-renewal order were a change in the city's adult zoning restrictions, rendering the business's previously lawful location a violation of the licensing ordinance, and requiring the immediate termination of all non-conforming uses, surely, before City officials could shut down such a business, the business should have the opportunity to assert constitutional defenses, such as that the new scheme effectively allowed no locations for adult businesses at all, in violation of the "reasonable opportunity" requirement of *Renton v. Playtime Theatres, Inc.*, 471 U.S. 41, 53 (1986). Likewise, if a licensing ordinance singled out adult businesses by providing that a renewal must be denied upon proof of even minor and easily curable violations of municipal code provisions unrelated to protecting the public interest from the effects of adult speech, like snow-shoveling ordinances, surely an adult business should have the opportunity to contest the constitutionality of such a provision, as applied to it, before its expressive activity could be terminated.

before expiration of its license by filing more than seventy-one days in advance of its expiration date. Respondent's Brief at 20. The seventy-one day figure, however, merely represents a sum of the allotted time periods for those phases of the Chapter 68 review process that are required to be completed within stated times. There are two crucial phases in the process, the public hearing itself, and post-hearing briefing, that are not required to be finished within any fixed period. Because a renewal applicant cannot know how much time these phases of the review process might consume, it cannot calibrate its filing date with any certainty at all. There is "no means by which an applicant may ensure" completion of the review process prior to the expiration of its license. *FW/PBS*, 493 U.S. at 227 (plurality opinion).

The City suggests that any necessary protection of a speaker's rights during the judicial review process can be achieved, at a point after closure of a business will likely already have occurred, by seeking a discretionary temporary injunction in the reviewing court. This argument was recently considered and rejected by the Sixth Circuit in *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, ___ (6th Cir. 2000), which said that it, "both misinterprets a long line of legal precedent in the area of prior restraints and minimizes the Importance of the First Amendment freedoms at stake."

This suggested remedy is totally inadequate because, no matter how promptly a reviewing court may be presented with a claim for interim relief: 1) in a scheme like Waukesha's, where it is quite possible for an existing license to expire long before exhaustion of administrative review, a business may already have been closed for a substantial period of time before even getting to court; and 2) there is no guarantee as to how swiftly the court will either hear or rule on even an *interim* request for relief. It goes without saying that any realistic assessment of the length of time a business stands to be closed prior to any opportunity for interim relief must also include the time it will take the business to find a lawyer, and the

time it will take the lawyer to prepare the requisite court papers.

Moreover, in order to obtain temporary relief in court, an applicant would necessarily be required to demonstrate a likelihood of success on the merits. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis.2d 513, 519-20, 259 N.W.2d 310, 313-14 (1977). Since the final decision on the merits will simply consist of a review of the administrative record, the court would necessarily have to base any interlocutory determination regarding whether the applicant has a likelihood of ultimate success on the same record. It obviously could not do so until the record would be prepared and transmitted to it by the municipality. Before the September 19, 2000, amendment of the ordinance (Petitioner's Lodging, Tab 9) this process, too, entailed the prospect of indefinite delay.

The City also suggests that a licensee could possibly obtain relief against the interruption of its business through filing a collateral action, and can lawfully be relegated to this remedy. Such a holding by this Court would be even less faithful to its consistent requirement that protection for the procedural rights of licensees in any speech-licensing scheme be guaranteed.

V. THE DIRE CONSEQUENCES PROJECTED BY THE CITY WILL NOT FLOW FROM A RULING THAT PROTECTS A NON-RENEWED LICENSEE'S RIGHT TO OPERATE THROUGH THE FIRST LEVEL OF JUDICIAL REVIEW.

A. The Issue Before This Court Involves Only Preserving The Status Quo For Ongoing Speech Pending Judicial Review.

The City argues that the status quo rule of *Freedman* and *Southeastern Promotions* unlawfully discriminates in favor of ongoing speech, since new applicants "have . . . as great a First Amendment interest as existing adult businesses." Respondent's Brief at 42. The City implies that any rule that an unsuccessful applicant for *renewal* must be allowed to operate until it receives a judicial decision would confer upon applicants for *new*

licenses an equal-protection right to open and operate pending judicial review, though they might be totally unqualified for licensure. This argument ignores the fact that this Court has already said that licensors may impose a prior restraint for a short period prior to judicial review if such restraint merely preserves the status quo. *Freedman* at 58-59. No question concerning the rights of new applicants is presented in this case. There is, moreover, good reason for being especially careful that procedural protections are afforded to speech in progress.

First, interruption of an existing business is much more likely to work a permanent termination of its expressive activity, as it is much more likely to lead to insolvency, which would cause an ultimate judicial decision to be "too little, too late." A brief, temporary delay is less likely to have equally devastating consequences for a business that has not yet opened, and may not have ongoing expenses. Second, as the Court recognized in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988), there is a real possibility that the content of ongoing, unpopular speech will arouse a retaliatory animus. In contrast, regulators dealing with a new applicant will have only a general idea of the content of its future speech, which is less likely than speech in progress to engender a motive to retaliate like that of which the Court warned in *Lakewood*.

B. Application Of *Southeastern's* Status Quo Requirement For Prior Restraints Will Not Interfere With The Enforcement Of Laws Of General Application, Such As Tax And Sanitation Laws, Even Against Those Engaged In Protected Expression.

The City suggests that *Southeastern's* status quo requirements would adversely affect "every kind of regulation of every kind of expressive business," including zoning, tax, and sanitation laws. Respondents Brief at 18, 41, 42. The City predicts that municipal regulators of all kinds would be hamstrung and the courts would be flooded. This Court considered and disposed of a similar argument in connection with a scheme that allowed for

substantive discretion in licensing decisions, in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760-61 (1988). As the Court recognized there, laws of general application, which are not tied to licensing schemes for expressive activity,[19] and which do not otherwise function as prior restraints, do not present the dangers of hidden censorship discussed above. Therefore, such laws need not manifest the *Freedman* procedural guarantees.[20] Nothing the Court does in this case will interfere at all with their administration.

C. A Municipality Has A Large Arsenal Of Weapons At Its Disposal In Cases Where A Business Presents An Ongoing Danger To The Public.

The City and its *amici* contend vigorously that a rule allowing a business to stay open pending judicial review opens the public to grave danger. When one bears in mind that a license nonrenewal is mandatory after *any* violation of the Ordinance, no matter how trivial, one

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[19] "A law is 'general' for present purposes if it regulates conduct without regard to whether that conduct is expressive." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575-576, n. 3 (1991) (Scalia, J., concurring). The distinction between a law of general application and a law tied to speech is illustrated by the requirement at WMC § 8.185(10)(d) that the premises be kept "clean." A law that simply required all businesses to be kept clean, theatres and restaurants alike, with like sanctions for all, would be a law of general application. A law that required all businesses to be kept clean, tied to a licensing scheme only for expressive activity (such that a theatre could forfeit its very right to exist if popcorn on the floor went unswept for too long, but a restaurant could not), would not be a law of general application.

[20] The Court, though, has been watchful to make sure that enactments that masquerade as laws of general application are not structured so as to be "more onerous" with respect to those engaged in expressive activity "than with respect to the vast majority of other businesses." *FW/PBS* at 225. Such laws trigger the safeguard requirement.

must question how often such danger is real, but if a case arises in which it *is* real, the municipality has many tools at hand to address it. Individual violations of the Ordinance can be separately prosecuted. Also, the municipality itself can seek temporary and permanent injunctive relief in court, even in the context of prosecutions for those very violations. *Town of Wayne v. Bishop*, 210 Wis.2d 219, 565 N.W.2d 201 (Ct. App. 1997). In Wisconsin, anybody can bring a nuisance action pursuant to §§ 832.09-11 Wis. Stats. and seek an injunction closing the business for a year. *State v. Panno*, 151 Wis.2d 819, 447 N.W.2d 74 (Ct. App. 1989).[21] In this case, the Waukesha County District Attorney's office did bring such an action against City News. The court granted a prompt temporary injunction requiring removal of the Petitioner's movie booths, and the court's final order mandated modifications in the store's operation. (Petitioner's Lodging at Tabs 4-6).

CONCLUSION

The risks of long-term improper suppression of protected speech inherent in Waukesha's license renewal procedures are real, while the risks associated with maintenance of the status quo through a single level of judicial review are slight because true emergencies can be addressed in so many other ways. The burdens faced by a renewal applicant facing closure, prior to judicial review, based on erroneous factual findings or constitutionally impermissible reasons, are substantial and in some cases

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[21] As noted by this Court in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), such a sanction does not offend the First Amendment because it is location-specific and does not preclude its target from engaging in expressive activities at other locations in the municipality, unlike a license nonrenewal which imposes a five-year city-wide disability. It is also of great significance that in such a nuisance action, any sanction is imposed by a judge, not a municipal official, so no restraint of expression occurs prior to judicial review of the facts, the law, and the defendant's constitutional rights.

insurmountable, while the burdens on a municipality facing a problem business holding over during judicial review are ordinary, and are, after all, part of the business of government. Surely, the First Amendment cannot tolerate a licensing scheme under which hostile local officials may close an expressive business before it has had any opportunity to assert its constitutional defenses. This Court should hold Waukesha's permit renewal scheme facially unconstitutional, and reverse the decision of the Wisconsin Court of Appeals with instructions remanding the matter for further proceedings consistent with its opinion.

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In the Supreme Court of the United States

CITY NEWS AND NOVELTY, INC., PETITIONER

v.

CITY OF WAUKESHA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT II

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the First Amendment requires a municipal ordinance that governs the licensing of adult-oriented businesses to ensure that a license remains in effect until there has been a judicial decision on the validity of the city's decision not to renew the license.

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In the Supreme Court of the United States

No. 99-1680

CITY NEWS AND NOVELTY, INC., PETITIONER

v.

CITY OF WAUKESHA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT II

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a licensing scheme that regulates businesses that seek to display or sell adult-oriented material protected by the First Amendment must guarantee an automatic stay of a decision denying a licensing renewal pending judicial review, where the decision is based on considerations other than the content of the material that is displayed or sold. The National Park Service (NPS) within the United States Department of the Interior is charged with promoting and regulating the use of the National Parks, some of which are often used for special events and demonstrations, such as marching, picketing, religious services, and other activities protected under the First Amendment. 16 U.S.C. 1 (1994 & Supp. IV 1998); *Clark*

v. *Community for Creative Non-Violence*, 468 U.S. 288, 289-290 (1984). NPS has promulgated regulations that provide that demonstrations and special events in the National Capital Region generally may not be held without a permit. 36 C.F.R. 7.96(g)(2). The NPS has promulgated time, place, and manner restrictions governing demonstrations and special events. 36 C.F.R. 7.96(g)(5). NPS's regulations also set forth procedures for the application, extension, or revocation of a permit, 36 C.F.R. 7.96(g)(3), (4)(iii), (5)(iv) and (6), but those regulations do not require a judicial decision on the merits before the denial takes effect.

The Forest Service within the United States Department of Agriculture has similar regulations for the issuance, renewal, and termination of special-use permits that govern non-commercial activity conducted by groups of 75 or more persons on lands in the National Forest System. 36 C.F.R. 251.50, 251.51, 251.54, 251.56, 251.60, 251.64. Those regulations are designed to "provid[e] a reasonable administrative system for allocating space among scheduled and existing uses and activities, address[] concerns of public health and safety, and control[] or prevent[] adverse impacts on forest resources." 60 Fed. Reg. 45,258 (1995). The United States therefore has a significant interest in the Court's resolution of the question presented.

STATEMENT

1. Respondent, the City of Waukesha, Wisconsin, determined that adult-oriented establishments contribute to declining property values and an increased level of criminal activity in surrounding communities. Waukesha, Wis., Mun. Code (Mun. Code) § 8.195 (1995) (preamble).[1] In order to

[1] The ordinance defines adult-oriented establishments to include "'adult bookstores,' 'adult motion picture theaters', 'adult mini-motion picture establishments' or 'adult cabarets,'" as those terms are defined under the ordinance. Mun. Code § 8.195(1). An "adult bookstore" includes "an establishment having as a substantial or significant portion of its stock in trade, for sale, rent, trade, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities." *Ibid*; see also *ibid.* (defining "specified anatomical areas" and "specified sexual activities").

combat those secondary effects, respondent enacted an ordinance that provides that no "adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City." *Id.* § 8.195(2). The ordinance specifies minimum age qualifications for license applicants, *id.* § 8.195(4)(a)(1) and (b)(1), and prohibits the issuance of a license to any applicant who violated respondent's ordinance within the preceding five years, *id.* § 8.195(4)(a)(2) and (b)(2). The ordinance further regulates the physical layout of adult-oriented establishments that have a "booth, room or cubicle for the private viewing of any adult entertainment." *Id.* § 8.195(9). The ordinance bars adult-oriented establishments from allowing minors to enter such establishments, *id.* § 8.195(10)(c); requires such establishments to maintain the premises in "a clean and sanitary manner," *id.* § 8.195(10)(d); and requires adequate lighting for "the public portions of the establishment," *id.* § 8.195(10)(e).

The ordinance provides that every license terminates after one year from the date of issuance. Mun. Code § 8.195(7)(a). An application for renewal of a license must be filed "not later than 60 days before the license expires." *Ibid.* The ordinance sets forth the procedures for obtaining an initial license, which respondent and the courts below construed to apply as well to obtaining a renewal of a license. Pet. App. 13-14. Under those procedures, the city clerk, upon receipt of an application for license renewal, must notify the applicant within 21 days whether the renewal has been granted or denied, and the clerk must state in writing the reasons for any denial. Mun. Code § 8.195(3)(c) and (d).

An unsuccessful renewal applicant then has two options. First, under the ordinance, the applicant has ten days after being notified of the denial to request a public hearing, which must be held within ten days of the request. Mun. Code § 8.195(3)(d).[2] Second, the applicant may follow the administrative procedures under state law that generally govern the "granting, denial, renewal, nonrenewal, revocation or suspension of a license." *Id.* § 8.195(11); see Wis. Stat. Ann. (Wis. Stat.) § 68.02(2) (West 1999). Under those alternative procedures, an unsuccessful applicant for a license renewal has 30 days to request the City to review its initial determination. *Id.* § 68.08. The City then has 15 days to conduct its review and issue a decision. *Id.* § 68.09(3). The applicant may appeal an adverse decision within 30 days, *id.* § 68.10(1) and (2), and the City must provide a hearing within 15 days of receipt of the notice of appeal. *Id.* § 68.11(1). The City must issue its final determination within 20 days after the hearing is completed. *Id.* § 68.12(1). Finally, whether the City renders a final decision under its ordinance or alternatively under state law, an unsuccessful renewal applicant has a right to obtain judicial review of the City's final decision by filing a certiorari action in state court within 30 days of receipt of the City's decision. *Id.* §§ 68.13(1) and 781.01 (Supp. 1999); see also Mun. Code §§ 2.11(1), 8.195(11).

2. Petitioner is the operator of an adult-oriented establishment located in the City of Waukesha which makes available to its customers sexually explicit materials, including books, magazines, and videotapes. Petitioner's establishment also provides viewing booths in which customers may view sexually explicit videotapes. Pet. App. 3. On November 15, 1995, petitioner applied for renewal of its

[2] As discussed pp. 29-30, *infra*, after the Court of Appeals held Section 8.195(3)(d) unconstitutional because it failed to require the city to reach a final determination within a definite time limit (Pet. App. 25-26), respondent amended Section 8.195(3)(d).

license, which was due to expire on January 15, 1996. *Id.* at 7. On December 19, 1995, the City's Common Council passed a resolution denying petitioner's renewal application because petitioner had violated the licensing ordinance by permitting minors to loiter on the premises, by failing to maintain an unobstructed view of the viewing booths, and by allowing patrons to engage in sexual conduct inside the booths. *Ibid.*; see also *id.* at 76-83.

Petitioner requested review by the Common Council, which affirmed the decision on January 22, 1996. Petitioner then invoked the administrative review procedures under Wisconsin Statutes Annotated Section 68.10 and, on June 28, 1996, the City of Waukesha Administrative Review Appeals Board affirmed the Common Council's decision. Pet. App. 8, 72-73.[3]

Petitioner filed in the Circuit Court for Waukesha County a certiorari action under Wisconsin Statutes Annotated Sections 68.13 and 781.01 (West Supp. 1999) challenging respondent's decision not to renew its license. Compl. No. 96 CV 1427 (Cir. Ct.). The Circuit Court affirmed respondent's decision. Pet. App. 55-71. The court rejected petitioner's contention that the licensing scheme conferred unbridled discretion upon city officials to grant or deny an application for license renewal. *Id.* at 57-60. The court also held that respondent's licensing scheme required an administrative decision to be issued within definite time limits, *id.* at 60-62, and that, under the scheme, "most of the [administrative] review process can be completed prior to the expiration of the one year term of the license," *id.* at 64. The court also concluded that the ordinance adequately provided "access to prompt judicial review under Wisconsin Statute Chapter 68." *Ibid.*

[3] Petitioner had waived the time periods under Sections 68.11 and 68.12. Pet. App. 73.

3. The Court of Appeals of Wisconsin affirmed in part and reversed in part. Pet. App. 1-43. The court observed (*id.* at 9-10) that a plurality of this Court in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225 (1990), concluded that the First Amendment bars a licensing scheme regulating sexually-oriented business from placing "unbridled discretion in the hands of a government official or agency" who decides whether to grant or withhold a license. The court also observed that the plurality concluded that the "licensing decision must be made 'within a specified and reasonable time period during which the status quo is maintained,' and that "a regulatory scheme must provide for 'prompt judicial review' in the event that a license is erroneously denied." Pet. App. 10 (quoting *FW/PBS*, 493 U.S. at 228).[4]

Applying those principles, the Court of Appeals held that respondent's ordinance "contains specific guidelines for renewal" and therefore does not confer "unbridled discretion" on city officials in making a licensing decision. Pet. App. 12. The court further held that the ordinance preserves the status quo during the period in which a licensor makes a decision. *Id.* at 19. The court reasoned that the ordinance requires an applicant to apply for a license renewal at least 60 days before the expiration of the license, and the ordinance requires city officials to approve or deny the application within 21 days. *Ibid.*

The court held, however, that Section 8.195(3)(d), which required respondent to hold a public hearing within ten days of the applicant's request but imposed no further limitations, "create[d] a risk of an indefinite delay by putting an applicant at the mercy of the licensing body," because it failed to direct respondent "as to what it must do following the hearing or when it must presumably take action in response to the hearing." Pet. App. 25-26. The court nonetheless held that severance of the invalid hearing provision "le[ft] intact an otherwise complete licensing scheme," because the ordinance incorporated the alternative administrative review procedures under Chapter 68 of the Wisconsin Statutes. *Id.* at 28. The court determined that Chapter 68 "sets forth narrow, definite and objective standards for bringing an appeal." *Ibid.*

[4] The Wisconsin Supreme Court earlier had declined (Pet. App. 53) the Court of Appeals' certification of the questions whether "an 'adult-oriented establishments' municipal ordinance that fails to preserve the status quo during the administrative license renewal process [is] facially unconstitutional" and whether "the ordinance [is] unconstitutional if it fails to provide express time limits for judicial review." *Id.* at 44-45.

The Court of Appeals also rejected petitioner's contention that the ordinance is constitutionally defective for failing to guarantee a judicial decision upholding the denial of a license before the denial takes effect. The court acknowledged (Pet. App. 20) that *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965), held that a licensing scheme that involved the direct censorship of expressive material must "assure a prompt final judicial decision." The court noted, however, that "more recently in *FW/PBS* the Court appears to have relaxed this requirement." Pet. App. 20. The court explained that the plurality in *FW/PBS* stated that "expeditious judicial review of [the licensing] decision must be *available*," and that "there must be the *possibility* of prompt judicial review in the event that the license is erroneously denied." *Ibid.* (quoting 493 U.S. at 227, 228 (emphasis added by Court of Appeals)). The court held that "prompt access or availability of judicial review satisfies First Amendment protections," reasoning that "a municipality does not have the authority to direct a state judicial court to issue a decision within a specified period of time." *Id.* at 22. The court accordingly found that the city's ordinance is constitutional because it permits an

aggrieved applicant to file a certiorari action to obtain judicial review of the city's final determination. *Id.* at 23-24.[5]

The Wisconsin Supreme Court denied further review. Pet. App. 54.

SUMMARY OF ARGUMENT

I. A. Businesses that are subject to respondent's licensing scheme have a right to judicial review of a final municipal decision not to grant or renew a license. Mun. Code §§ 2.11(1), 8.195(11); Wis. Stat. § 68.13(1). A court reviewing such a decision also may stay the city's licensing decision if the city declines to stay the effect of its own decision and the applicant can demonstrate that it is entitled to temporary relief pending judicial review. Wis. Stat. § 781.02 (Supp. 1999); *id.* § 813.02(1)(a) (1994 & Supp. 1999). Under those procedures, a court may fully protect the First Amendment interests of a license applicant that otherwise could not operate its business pending judicial review of the city's licensing decision. In light of the procedure for issuance of a stay in particular cases where the requisite showing has been made, respondent has not demonstrated an adequate justification for a rule that would require an *automatic* stay of *all* decisions denying an applicant a license renewal.

B. Any benefit to be served by an automatic stay rule would be outweighed by the harm to a city's interest in enforcing a licensing scheme to control the secondary effects of adult-oriented establishments. A city has a substantial interest in imposing time, place, and manner restrictions on sexually-oriented businesses to eradicate adverse secondary

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[5] The Court of Appeals also rejected petitioner's contentions (1) that the Mayor improperly participated in the city's decision to deny petitioner's renewal application, Pet. App. 29-31; (2) that petitioner had insufficient notice of the city's charges, *id.* at 31-35; and (3) that respondent should have suspended petitioner's license as a less severe sanction, *id.* at 35-37. The court then sustained the grounds upon which respondent based its non-renewal determination. *Id.* at 38-42.

effects. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). That interest would be significantly impaired by a rule that automatically barred a city's licensing decision from going into effect until a court has resolved any challenge to the decision. Such a rule also would be particularly pernicious in cases in which the city has determined that a renewal applicant has repeatedly violated the licensing scheme and is therefore not qualified to operate an adult-oriented establishment.

C. This Court's First Amendment precedents do not require that a city's licensing scheme provide for an automatic stay of all adverse licensing-renewal decisions. The Court has required a prior judicial determination on the merits of a censorship decision to guard against the risk that censoring officials will ban protected speech and the risk that a censored speaker will refrain from bringing a judicial challenge to a particular censorship decision. *Freedman* v. *Maryland*, 380 U.S. 51, 57-59 (1965); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 229 (1990) (plurality opinion) (discussing *Freedman*). Neither of those dangers is inherent under a licensing scheme that is not aimed at the suppression of speech, but is designed to combat the secondary effects of sexually-oriented businesses. City officials under such an ordinance do not condition a license upon the review or approval of the content of an applicant's materials. Rather, they determine whether an applicant is qualified to hold a license. In those circumstances, a decision that an applicant is not entitled to renewal of its license is akin to a variety of administrative decisions to which a court applies a deferential standard of review, and which may be stayed pending judicial review only when temporary relief is found to be warranted in the circumstances of the particular case. See Administrative Procedure Act, 5 U.S.C. 705-706; Fed. R. Civ. P. 65(a) and (b).

D. An automatic stay rule cannot be justified on the ground that a court should resolve any facial challenge to a municipal licensing scheme before a licensing decision takes effect. Applicants may bring a facial challenge to a city's ordinance without first exhausting the city's administrative review procedures. Nor is an automatic stay rule justified on the premise that city officials might be hostile to the First Amendment rights of license applicants. Respondent's licensing determinations are made without regard to the content of any material sought to be displayed or sold by an applicant, and the ordinance contains objective criteria that govern whether city officials will renew an applicant's license. In any event, there has been no showing that city officials act in bad faith in administering municipal licensing schemes generally or that respondent's officials have done so in this case.

II. Petitioner's challenges to the alternative *administrative* review procedures under state law are not properly before this Court. Petitioner's contentions were neither timely raised nor passed upon by the Wisconsin Court of Appeals, and similarly were not raised in the petition for a writ of certiorari. There is in any event no occasion for this Court to review petitioner's contentions because respondent has recently amended the administrative review procedures under its ordinance.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE A MUNICIPAL LICENSING ORDINANCE THAT REGULATES SEXUALLY-ORIENTED BUSINESSES TO GUARANTEE AN AUTOMATIC STAY OF THE DENIAL OF A LICENSE RENEWAL PENDING JUDICIAL REVIEW

In *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), this Court held that a "noncriminal process which requires the

prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." "First, the burden of proving that the film is unprotected expression must rest on the censor." *Ibid.* Second, "the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film," *id.* at 58-59, and that "[a]ny restraint imposed in advance of a final determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution," *id.* at 59. Third, the censorship scheme "must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Ibid.*

In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), this Court considered whether the procedural requirements imposed by *Freedman* applied to a municipal licensing ordinance that regulated sexually-oriented businesses in order to eradicate the adverse secondary effects of such businesses. *Id.* at 220. A plurality of the Court described the three *Freedman* safeguards as follows:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Id. at 227. In a series of opinions, the Court in *FW/PBS* held that only the first two of those safeguards applied to the city's licensing scheme.

With respect to the first two safeguards, a plurality of the Court concluded that, under the city's ordinance, "the licensor must make the decision whether to issue the license

within a specified and reasonable time during which the status quo is maintained." *Id.* at 228. The plurality also concluded that "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Ibid.* The plurality found that the licensing scheme in that case failed those two requirements, because it provided neither "an effective limitation on the time within which the licensor's decision must be made" nor "an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *Id.* at 229. Justice Brennan, joined by Justices Marshall and Blackmun, concurred in the judgment, concluding that because in their view "all three of the procedural safeguards specified in" *Freedman* should be applicable, *id.* at 239, the city should also "bear the burden of going to court and proving its case before it may permissibly deny licenses to First Amendment-protected businesses," *id.* at 240.

With respect to the third *Freedman* requirement, the plurality concluded that "the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 230. The plurality explained that the city's ordinance was "significantly different from the censorship scheme examined in *Freedman*," because unlike in *Freedman*, where the government "engaged in direct censorship of particular expressive material," the city officials in *FW/PBS* administered the licensing ordinance without regard to the content of any protected speech. *Id.* at 229. The plurality further reasoned that the city's ordinance did not pose the risk that those seeking a license would be deterred from challenging an adverse licensing decision in court. *Id.* at 229-230. The plurality thus concluded that the First Amendment is satisfied when there is a "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review." *Id.* at 230. Justice White, joined

by the Chief Justice, disagreed with the plurality's application of *Freedman*, concluding that none of *Freedman*'s requirements applied to the city's ordinance. *Id.* at 244-249. Justice Scalia, in his dissent, reasoned that the licensing scheme was not subject to the First Amendment. *Id.* at 250-264. Those three Justices therefore necessarily agreed with the plurality's conclusion that the city did not bear the burden of going to court to enforce its licensing scheme and did not bear the burden of proof once in court.

Neither *Freedman* nor *FW/PBS* addressed the precise issue presented in this case—whether, as petitioner urges (Br. 43-49), the First Amendment requires a municipal licensing scheme that regulates sexually-oriented businesses to provide for an automatic stay of the city's licensing decision pending a judicial determination on the merits.[6] In our view, the answer to that question is no. Under respondent's ordinance, a licensing decision is amenable to prompt judicial review, and a court has the authority in a particular case to preserve the status quo pending judicial review of the city's decision if the city declines to stay its own decision pending judicial review and the applicant makes the showing required for interim relief. Those procedures properly balance the First Amendment interests of applicants and the city's competing interest in enforcing a licensing scheme to combat the secondary effects of sexually-oriented business. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) (Procedures necessary to satisfy due process depend on consideration of "[f]irst, the private interest that will be affected by the official action; second, the risk of an

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[6] Petitioner specifically does not argue that the city's decision must be stayed until it is final in the sense that all judicial appeals have been exhausted. Pet. Br. 44 & n.27; see also *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 690 n.22 (1968) ("The assurance of a 'prompt final judicial decision' is made here * * * by the guaranty of a speedy determination in the trial court.") (quoting *Freedman*, 380 U.S. at 59).

erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the * * * burdens that the additional or substitute procedural requirement would entail.").

A. Respondent's Licensing Scheme Adequately Protects The First Amendment Interests Of Applicants By Authorizing A Court To Stay The City's Licensing Decision

1. Respondent's ordinance provides that a business subject to its licensing scheme may obtain judicial review of a final municipal decision not to grant or renew a license by filing a certiorari action in state court within 30 days of receipt of the city's decision. Mun. Code §§ 2.11(1), 8.195(11); Wis. Stat. § 68.13(1). "[T]he statutory review by certiorari is a matter of right," and such an action "inquires into not only the jurisdiction of the board or body making the determination but also the merits of the determination." *Browndale Int'l Ltd.* v. *Board of Adjustment*, 208 N.W.2d 121, 129 (Wis. 1973) (quoting *State ex rel. Casper* v. *Board of Trustees*, 140 N.W.2d 301, 304 (Wis. 1966)), cert. denied, 416 U.S. 936 (1974). Thus, in a certiorari action, the reviewing court "may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision." Wis. Stat. § 68.13(1).

Moreover, a business that has been denied a license renewal has two ways in which it may obtain interim relief pending judicial review. First, it may request the city to stay its own licensing decision pending judicial review. Indeed, respondent granted that relief in this very case. Pet. Br. 10 n.11 ("[T]he City exercised its discretion to *not* enforce its licensing requirement * * * while all relevant * * * judicial review was proceeding."); cf. 5 U.S.C. 705 ("When an agency finds that justice so requires, it may

postpone the effective date of action taken by it, pending judicial review.").

Second, a business denied a stay by the city may request the court to issue an immediate stay of the decision if the business can demonstrate that it is entitled to temporary relief pending judicial review. Wisconsin law expressly provides that a court in a certiorari action may award "temporary relief pending disposition of the action or proceeding." Wis. Stat. § 781.02 (Supp. 1999); cf. 5 U.S.C. 705 (reviewing court may postpone effective date of agency action or preserve status or rights during judicial proceedings). State law similarly allows a court to enter a temporary injunction to restrain an act "[w]hen it appears from a party's pleading that the party is entitled to judgment" and the commission of the act sought to be restrained "during the litigation would injure the party." Wis. Stat. § 813.02(1)(a) (1994 & Supp. 1999); see *Werner* v. *A.L. Grootemaat & Sons, Inc.*, 259 N.W.2d 310, 314 (Wis. 1977) (party must show a "reasonable probability of ultimate success on the merits" and "irreparable harm").

Under those procedures, a court not only may review and reverse a decision by respondent not to renew a license, but also may preserve the status quo pending a judicial decision on the merits. Far from being "meaningless" (Pet. Br. 48 (quoting *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998)), the governing procedures permit a court in a particular case to stay the effect of a decision denying a license renewal if an applicant can demonstrate that it is likely to succeed on the merits and that the city's decision would cause the applicant irreparable harm. See Wis. Stat. § 813.02(1)(a) (1994 & Supp. 1999). Petitioner does not challenge the proposition that, by preserving the status quo, such a stay will fully protect the First Amendment rights of an applicant who has been denied a license renewal.

2. Petitioner argues (Br. 45-49) that an *automatic* stay is required because applicants that have been denied a license

renewal *always* suffer irreparable harm to their First Amendment or economic interests if they cannot operate their businesses while a court is resolving a judicial challenge to the city's decision. It is significant for purposes of First Amendment analysis, however, that any harm to an adult-oriented business's interests in selling or displaying expressive materials pending judicial review is not the product of direct censorship of the materials based on their content, but rather the incidental consequence of a decision based on the qualifications of the applicant (including, here, its past conduct), without regard to the content of the materials. See pp. 21-24, *infra*. Furthermore, petitioner ignores the usual requirement that a party seeking a stay must demonstrate both irreparable harm *and* a likelihood of success on the merits. Under respondent's ordinance, the business will already have had an opportunity for a hearing prior to the city's decision denying its application. This Court held in *FW/PBS* that the First Amendment allows such a decision by the city to be conclusive unless the applicant bears the burden of going to court to challenge the decision. See pp. 12-13, *supra*. There accordingly is no reason why the First Amendment should bar state law from requiring an applicant who chooses to challenge the city's decision from also bearing the lesser burden of demonstrating at least a likelihood that the decision was erroneous before obtaining an interim stay.

Petitioner of course does not suggest that applicants are entitled under the First Amendment to operate an adult-oriented business *after* the first reviewing court affirms the city's decision denying to grant or renew a license. See p. 13, note 6, *supra*. Thus, an automatic stay rule would confer an unjustified windfall on applicants who would not have been entitled to a stay on the basis of their individual circumstances and who ultimately lose on the merits. Indeed, an automatic stay rule would advance an applicant's legitimate First Amendment interests only in the limited situation in

which both the city and the court would have denied an applicant's request for a stay but the court ultimately reverses the city's decision. Petitioner offers no basis for concluding that such a situation arises with sufficient frequency to impose an automatic stay rule, especially since the applicant would have had a fair *opportunity* for immediate judicial relief on an interim basis, but simply failed to make the requisite showing at that point.

B. An Automatic Stay Rule Would Unduly Infringe Upon Respondent's Interest In Regulating The Secondary Effects Of Sexually-Oriented Businesses

1. This Court has recognized that the government has a legitimate and substantial interest in imposing time, place, and manner restrictions on certain businesses to "prevent[] harmful 'secondary' effects that are unrelated to the suppression of expression." *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1394 (2000) (plurality opinion) (upholding city ordinance banning public nudity); see also *id.* at 1402 (Souter, J., concurring in part and dissenting in part); see, *e.g. City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding a city ordinance that governed the zoning of adult motion picture theatres because the ordinance "is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community"); accord *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976); see also *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (regulations that were "unrelated to suppression of expression" served "substantial Government interest in conserving park property"). Here, respondent reasonably concluded that sexually-oriented businesses "affect property values, contribute to physical deterioration and blight, have a deleterious effect on both existing businesses around them and surrounding residential areas, including increased transiency [and] increased levels of criminal activities including

prostitution, rape, assaults and other sex related crimes." Mun. Code § 8.195 (preamble) (Pet. App. 95). Respondent therefore passed its ordinance not for "the purpose or effect of imposing a limitation or restriction on the content of any communicative materials," but to "combat and curb the adverse secondary effects brought on by adult oriented establishments." *Ibid.* (Pet. App. 97).

Respondent's interest in regulating those effects would be significantly impaired by a rule that barred respondent from enforcing a decision denying a license renewal in advance of a judicial determination upholding the decision, because such a rule would permit a business to operate even though the city has determined that the business is not fit to operate. An automatic stay rule similarly would be inconsistent with the Court's conclusion in *FW/PBS* that "the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application." 493 U.S. at 230 (plurality opinion); see also *id.* at 244 (White, J., concurring in part and dissenting in part). Aggrieved applicants under such a regime would have an enormous incentive to file a notice of appeal simply to effectuate an automatic stay of an adverse licensing decision. Although the applicant presumably would have the burden in the ensuing proceedings of challenging the decision on the merits, see *id.* at 229-230 (plurality opinion), an automatic stay of the licensing decision that the applicant challenges on judicial review would be, in the interim, the practical equivalent of requiring that the city "bear the burden of going to court to effect the denial of a license application." *Id.* at 230.[7]

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[7] Indeed, petitioner argues (Br. 40-42) that a city should seek a court order that temporarily closes such a business either "to prevent immediate and great injury to the public health or safety" (Br. 41) or because the business is a public nuisance. Neither of those alternatives would adequately protect a city's interests when an applicant's conduct or lack of qualifications does not rise to the level of "immediate and great injury to the public health or safety" or constitutes a public nuisance. See Wis. Stat. § 823.09 (1994) (defining public nuisance to include the maintaining or using of a building "for the purpose of lewdness, assignation or prostitution").

2. Petitioner recognizes (Br. 49 n.30) that an automatic stay rule might be inappropriate when the city denies an *initial* application, "before the subject expressive activity has begun." In that instance, an applicant has not shown that it is qualified to operate an adult-oriented business, because, *e.g.*, the applicant does not meet the minimum age qualifications, Mun. Code § 8.195(4)(a)(1) and (b)(1), or the applicant previously had violated respondent's ordinance within the preceding five years, *id.* § 8.195(4)(a)(2) and (b)(2). There is no principled distinction, however, between that situation and the denial of a renewal application on similar grounds. Indeed, respondent's interest in regulating the secondary effects of sexually-oriented businesses may be even stronger when it has denied a license renewal to an applicant that has repeatedly violated the city's ordinance and demonstrated in fact that it is not qualified to operate a sexually-oriented business. A requirement that the city must stay its decision denying a license renewal pending judicial review in that instance would significantly burden the city's legitimate and substantial interest in enforcing its licensing scheme.[8]

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[8] An automatic stay rule could impose significant costs in other contexts as well. For instance, the National Park Service and the Forest Service have promulgated content-neutral time, place, and manner regulations that govern the granting and renewal of permits to engage in expressive activity on national lands. See pp. 1-2, *supra*. A constitutional rule that required those permit decisions to be automatically stayed pending judicial review would prevent the government from issuing permits to other applicants who also wish to engage in expressive activity on the particular land at issue. See 36 C.F.R. 7.96(g)(5)(iv) (providing that permits for demonstrations will be extended "unless another application requests use of the particular area and said application precludes double occupancy"); 60 Fed. Reg. at 45,258 (promulgating Forest Service's

That principle is well-illustrated in this case. Here, city officials found that petitioner repeatedly had allowed minors to visit its premises and had permitted patrons to engage in sexual activity in viewing booths. Pet. App. 76-83. The courts below affirmed those findings as supported by substantial evidence, *id.* at 38-42, 69-70, and the courts similarly concluded that respondent properly declined to renew rather than suspend petitioner's license, "[c]onsidering both the health and safety issues as well as [petitioner's] record of ordinance violations." *Id.* at 37; see also *id.* at 69 (trial court). A rule that would require a city to permit such a business to operate simply because the business challenged the city's decision denying a renewal of the license would seriously undermine the government's interest in enforcing licensing regulations to "prevent[] harmful 'secondary' effects that are unrelated to the suppression of expression." *City of Erie*, 120 S. Ct. at 1394 (plurality opinion).

C. An Automatic Stay Rule Is Not Required By The First Amendment To Avoid The Dangers Of A Censorship Regime

Relying on this Court's decision in *Freedman* v. *Maryland*, *supra*, petitioner argues (Br. 16) that respondent's licensing scheme "may not *alter* the status quo by forcing the cessation of ongoing expressive businesses prior to judicial review." See also Pet. Br. 23-26, 32-33, 43-45. Petitioner's reliance on *Freedman* is misplaced. In that case, the Court relied on two rationales to support the requirement of special judicial review procedures. First, the Court found that government review and censorship of expressive activity present the inherent risk that officials will suppress protected speech. 380 U.S. at 57-59. Second, the Court concluded that a censorship scheme poses the significant danger

regulations in part to "provid[e] a reasonable administrative system for allocating space among scheduled and existing uses and activities").

that potential distributors or exhibitors will be deterred from bringing a judicial challenge to the decision to censor a particular work, because they would not have a sufficient stake in that one work to assume the burden of instituting judicial proceedings. *Id.* at 58-59. Those concerns, however, are not similarly present in the context of respondent's licensing scheme.[9]

1. Respondent's ordinance "provide[s] for licensing and regulation of adult oriented establishments * * * to combat and curb the secondary effects of such establishments." Mun. Code § 8.195 (preamble) (Pet. App. 97); see also *FW/PBS*, 493 U.S. at 220 (city ordinance "was aimed at eradicating the secondary effects of crime and urban blight"). In determining when a renewal applicant is eligible for a license under respondent's ordinance, city officials do not review or censor the content of any expressive material sold or displayed by a regulated business. Rather, the licensing scheme imposes time, place, and manner restrictions by regulating (1) the qualifications of a license applicant, (2) the physical layout of the business, and (3) the conduct that may occur on the premises. See Mun. Code § 8.195(4), (9) and (10).

Unlike a law that directly censors speech, respondent's ordinance does not present the risk identified in *Freedman* that city officials will impermissibly engage in the suppression of protected speech. In *Freedman*, the Court explained that where a "censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." 380

[9] Cf. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 308 n.20 (1986) (concluding that the "special judicial procedures" mandated by *Freedman* were not necessary to protect the First Amendment interests of non-union employees when the union determines whether service fees are related to collective bargaining activities).

U.S. at 57-58. The Court therefore concluded that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." *Id.* at 58.

This Court in other decisions has explained that "the line between unconditionally guaranteed speech and speech that may be legitimately regulated is a close one." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975); see also *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980) (per curiam) ("[T]he line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.") (quoting *Southeastern Promotions, Ltd.*, 420 U.S. at 559); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963) ("constitutionally protected expression * * * is often separated from obscenity only by a dim and uncertain line."). Because censorship schemes necessarily pose the risk that the government will suppress constitutionally protected speech, *Freedman* and other decisions reviewing such schemes have required the government to obtain a prompt judicial decision that affirms the censor's view that the speech sought to be restrained is actually unprotected.[10]

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[10] See, *e.g.*, *Vance*, 445 U.S. at 316 & n.14 (state law authorized judges to enjoin indefinitely exhibition of obscene films); *Southeastern Promotions, Ltd.*, 420 U.S. at 547-548 (administrative board barred stage production of "Hair"); *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 365-377 (1971) (law permitted customs agents to seize imported obscene materials); *Blount* v. *Rizzi*, 400 U.S. 410, 411-414 (1971) (postal laws permitted censorship of obscene mail); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141 (1968) (per curiam) (city motion picture censorship ordinance); *Bantam Books, Inc.*, 372 U.S. at 70-72 (state commission attempted to censor obscene books); cf. *National Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (trial court enjoined paraders from displaying swastika or materials promoting hatred of Jews); see also *Alexander* v. *United States*, 509 U.S. 544, 551 (1993) ("The constitutional infirmity in nearly all of our prior restraint cases involving obscene material * * * was that the government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so.").

There is no comparable danger that city officials will improperly suppress protected speech under a licensing scheme in which officials do not condition a license upon the approval of the speech sought to be exhibited. In those circumstances, "the city does not exercise discretion by passing judgment on the content of any protected speech." *FW/PBS*, 493 U.S. at 229 (plurality opnion). Rather, city officials determine whether a particular applicant is qualified to operate a sexually-oriented business, "a ministerial action that is not presumptively invalid." *Ibid.*[11]

Those principles are fully applicable here. When respondent denied petitioner's application for a license renewal, city officials did not base that denial on the content of any expressive material exhibited or sold by petitioner. Rather, city officials determined that petitioner had violated the licensing ordinance because petitioner had permitted minors to visit its premises, had failed to maintain an unobstructed view to the viewing booths, and had permitted patrons to engage in sexual activity in viewing booths. Pet. App. 76-80. Those kinds of determinations are routinely made by administrators, and they are not inherently fraught with First Amendment concerns. See *Graff* v. *City of Chicago*, 9 F.3d 1309, 1333 (7th Cir. 1993) (Flaum, J., concurring) ("Clearly included among such nonthreatening schemes are

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[11] Contrary to the suggestion of petitioner's amicus Liberty Project (Br. 16), the Court in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), did not hold that a content-neutral licensing scheme must provide for a prior judicial determination on the merits before a licensing decision may become effective. Rather, the Court in dicta simply stated that the validity of a municipal ordinance that authorized "no more than the objective and even-handed regulation of traffic on [city] streets and public ways" "would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit." *Id.* at 154-155 & n.4.

those that only ask *and* allow administrators to make the kind of determinations for which they are especially suited; *e.g.* questions about city aesthetics, traffic flow or City Code violations."), cert. denied, 511 U.S. 1085 (1994).

Similarly, a court reviewing a decision by respondent under its licensing scheme does not assume that the decision is presumptively invalid. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (noting "the presumption of regularity afforded an agency in fulfilling its statutory mandate"). To the contrary, the courts below were required to affirm respondent's decision denying petitioner a license renewal if the city "kept within its jurisdiction" and "acted according to the law," the decision was not "arbitrary, oppressive or unreasonable," and "the evidence presented was such that [respondent] might reasonably make the order or determination in question." Pet. App. 8. That deferential standard of review, which petitioner has not challenged, is indistinguishable from the standard of review accorded a wide variety of administrative decisions that are not subject to an automatic stay pending judicial review. See, *e.g.*, Administrative Procedure Act, 5 U.S.C. 705, 706; see also Fed. R. Civ. P. 65(b) (standards for obtaining a temporary retraining order).

2. This Court in *Freedman* also reasoned that a prior judicial determination affirming the censor's ban on speech was necessary because otherwise "it may prove too burdensome to seek review of the censor's determination." 380 U.S. at 59. The Court explained that an "administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor." *Ibid.* The plurality in *FW/PBS* similarly observed that when a censored speaker is "likely to be deterred from challenging the decision to suppress the speech, * * * the censor's decision to suppress [is] tantamount to complete suppression of the speech." 493 U.S. at 229.

Under respondent's ordinance, by contrast, "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *FW/PBS*, 493 U.S. at 229-230 (plurality opinion); accord *id.* at 248 ((White, J., concurring in part and dissenting in part) (businesses subject to city's licensing scheme "will have every incentive to pursue the licensing applications vigorously"). Similarly, applicants denied a license *renewal* by respondent "have much more at stake" economically than a one-time speaker subject to a censorship scheme, and are therefore likely to challenge an adverse decision by respondent if there is a reasonable basis for such a challenge. *Id.* at 229 (plurality opinion). In those circumstances, a prior judicial decision is unnecessary to prevent a denial of a license renewal from becoming "tantamount to complete suppression of the speech." *Ibid.* (plurality opinion).

D. Policy Considerations Do Not Support An Automatic Stay Rule

Petitioner also argues that policy reasons support an automatic stay rule. Those contentions lack merit.

1. Petitioner contends (Br. 27-29, 36) that a prior judicial determination is necessary so that a court may resolve an applicant's facial constitutional challenges to the ordinance's standards for license renewal or revocation. Petitioner further argues (Br. 38-40) that a court should resolve facial challenges before a licensing decision takes effect, because city officials cannot resolve them during the administrative review process. But applicants may bring a facial challenge to a city's licensing scheme without proceeding under the city's licensing scheme, either by filing a declaratory judgment action in state court, see Wis. Stat. § 806.04 (1994), or by filing an action under 42 U.S.C. 1983 in federal court. See, *e.g.*, *Baby Tam & Co.*, 154 F.3d at 1098-1099 (Section 1983

action).[12] This Court in *FW/PBS* allowed such a facial challenge to both the administrative and judicial review procedures, without requiring exhaustion of administrative remedies. See 493 U.S. at 223-225 (plurality opinion). The existence of possible facial challenges to a city ordinance therefore provides no basis for a rule requiring an automatic stay of all license-renewal denials pending judicial review.

2. Petitioner also asserts (Br. 32-35, 37, 44-45) that an automatic stay rule is necessary because local licensing officials are hostile to the First Amendment rights of sexually-oriented businesses. In determining whether to renew a license under respondent's ordinance, however, city officials do not review the content of any speech; rather, they decide whether a particular applicant is qualified to operate a sexually-oriented business. Official action under such a scheme is not based on the review of speech and therefore is not "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (plurality opinion). See pp. 21-24, *supra*.

Similarly, municipal licensing ordinances that regulate sexually-oriented businesses must be accompanied by objective standards that cabin the discretion of officials who decide whether to grant or deny a license. *FW/PBS*, 493 U.S. at 225-226 (plurality opinion); *id.* at 246 (White, J., concurring in part and dissenting in part); see also *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988) ("Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."). Here, the Court of Appeals determined that respondent's ordinance contains objective criteria that govern the standards for license renewal, and that holding is not at issue here. Pet. App. 12-16. Thus, because objective standards minimize the risk that officials who administer the ordinance will deny a license based on the speech of a particular applicant, there is no need for respondent to guarantee that its licensing decisions will not go into effect until a court determines that those objective standards were properly applied in a given case.[13]

[12] Indeed, in addition to instituting the proceeding below to challenge respondent's particular non-renewal decision, petitioner filed suit in both state and federal court seeking to invalidate respondent's ordinance as facially unconstitutional. See *City News & Novelty, Inc.* v. *City of Waukesha*, 487 N.W.2d 316 (Ct. App. 1992) (state declaratory judgment action), review denied, 491 N.W.2d 768 (Wis. 1992); Compl. No. 96-C-383 (E.D. Wis.) (Section 1983 action).

For similar reasons, petitioner errs in asserting that special judicial procedures are required to guard against the possibility that local officials will deny a license renewal application based on "false charges" or "factually questionable prostitution or lewd conduct charges against the dancers at an adult entertainment business." Br. 30, 31. It is presumed that city officials who administer licensing schemes that contain objective standards will properly discharge their duties under local law. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."); accord *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995). Moreover, petitioner has not asserted that any official misconduct occurred in this case. Cf. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 707 n.4 (1986) ("[T]here is no suggestion on the record before us that the closure of re-

[13] Petitioner argues (Br. 33) that *Walker* v. *City of Birmingham*, 388 U.S. 307, 317, 339 (1967) and *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 157-158 (1969), represent instances of "local officials who have used permitting or licensing laws to censor speech they disfavored." Unlike respondent's ordinance, however, the terms of the city's ordinance at issue in those decisions "clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks." *Id.* at 153.

spondents' bookstore was sought under the public health nuisance statute as a pretext for the suppression of First Amendment protected material."). In any event, as explained above, respondent's licensing scheme permits a court to preserve the status quo if an applicant can demonstrate a likelihood in a given case that city officials acted in bad faith in denying a license renewal.

II. PETITIONER'S CHALLENGES TO THE ADMINISTRATIVE REVIEW PROVISIONS UNDER STATE LAW ARE NOT PROPERLY BEFORE THIS COURT

Petitioner argues (Br. 4-5, 14-18, 19-22) that the provisions for administrative review of the city's licensing decisions under Chapter 68 of the Wisconsin Statutes Annotated are constitutionally deficient because they do not ensure an "administrative ruling on a permit application within a specified and brief time period," and because they "fail to preserve the status quo pending completion of * * * *administrative* review." Br. 17-18.[14] We do not address the merits of those contentions, however, because they are not properly before this Court.

First, petitioner's challenges to Chapter 68 were not timely raised or passed upon by the courts below. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997). As the Court of Appeals observed, petitioner did not

[14] Petitioner contends (Br. 5, 15, 21) that Chapter 68 allows the city a minimum time of 71 days in which to issue a final licensing decision, and that because the applicant is permitted to file his renewal application up to 60 days before a license expires, Mun. Code § 8.195(7)(a), the city may issue its final decision 11 days after the license expires. Petitioner also contends (Br. 5, 20) that the city may indefinitely delay making a final decision under Chapter 68 because, although Wis. Stat. § 68.12(1) mandates a final decision "[w]ithin 20 days of completion of the hearing * * * and the filing of briefs," Chapter 68 neither limits the duration of the hearing nor imposes any time constraints on the filing of briefs.

"directly challenge" the administrative review procedures of Chapter 68. Pet. App. 28.[15] Rather, petitioner challenged the administrative review procedures under Section 8.195 of the city's ordinance. The court agreed with petitioner's contention that Section 8.195(3)(d) did not contain definite time limits. *Id.* at 24-26. The court further accepted the proposition that there must be "effective preservation of the status quo during the period in which the licensor makes its decision." *Id.* at 19. The court held, however, that because the alternative state law procedures under Chapter 68 "set[] forth narrow, definite and objective standards" for administrative review, the ordinance as a whole is constitutional. *Id.* at 28.

Second, in its petition for a writ of certiorari, petitioner did not challenge the validity of the Chapter 68 administrative review procedures. Rather, petitioner asked this Court to resolve a conflict among the circuits concerning the guarantee of prompt judicial review. Pet. 13.[16] Petitioner therefore did not properly preserve its contentions in this Court. See Sup. Ct. R. 14.1(a); see, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 394 (1999); *Blessing*, 520 U.S. at 340 n.3.

Third, respondent has recently amended the administrative review procedures under its licensing scheme. As previously discussed, the Court of Appeals invalidated Section 8.195(3)(d) because it failed to direct city officials to take

[15] In its briefs to the Court of Appeals, petitioner did not raise the arguments that it now advances. It was not until six days after oral argument that petitioner stated its view that a hearing under Section 68.12 could be indefinitely extended. See Letter from Jeff Scott Olson to Court of Appeals 1-2 (Apr. 19, 1999).

[16] This Court limited its grant of certiorari to the third question presented, see 120 S. Ct. 2687 (2000), which was whether "a licensing scheme which acts as a prior restraint is required to contain explicit language which prevents injury to a speaker's rights from want of a prompt judicial decision." See Pet. i.

action after holding a hearing. Pet. App. 25-26. On September 19, 2000, respondent amended Section 8.195(3)(d), effective immediately, to require city officials to issue a final licensing determination within 20 days of the commencement of the hearing. Waukesha, Wis., Ordinance 42-00. License applicants now may invoke the administrative procedures under amended Section 8.195(3)(d) instead of the alternative administrative procedures under Chapter 68 that petitioner now challenges. No court has passed on the validity of the amended ordinance, and thus any issue concerning the constitutionality of the alternative Chapter 68 procedures may be of no continuing significance. Especially in these circumstances, there is no occasion for this Court to address petitioner's challenges to Chapter 68.

CONCLUSION

For the foregoing reasons, the decision of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted.

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No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,
Petitioner,

v.

CITY OF WAUKESHA,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF THE LIBERTY PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, The Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The organization espouses vigilance over regulation of all kinds, as well as restriction of

[1]Petitioners and respondents both have consented to the filing of this *amicus* brief. Counsel for respondent has informed *amicus* that a letter of consent has previously been filed with the Court. Petitioner's letter of consent is being lodged with the Clerk.

individual civil liberties such as the rights to free speech and to association, which threaten the reservation of power to the citizenry that underlies our constitutional system.

This case implicates one of the most profound individual liberties, the right to free speech, a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual. Laws imposing licensing requirements on expression are of particular concern to The Liberty Project because they undermine or destroy this fundamental right. If not subject to prompt and effective judicial review, such laws present a particular danger of abuse, with extremely severe consequences for targeted individuals and types of expression. The Liberty Project's strong interest in the protection of the freedom of all citizens to engage in expression without government interference will allow it to provide this Court with additional insight into the constitutional values at stake in this case.

SUMMARY OF ARGUMENT

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court set forth three procedural safeguards required of administrative prior restraints to ensure that undue delay does not result in the unconstitutional suppression of speech. One of those safeguards, that any administrative refusal to permit speech must be accompanied by "a prompt final judicial decision," 380 U.S. at 59, recognized both that a public official's refusal to deny a license will sometimes be erroneous and that, absent prompt and certain judicial review, that refusal could be tantamount to a final decision. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court considered the applicability of *Freedman* to an

administrative licensing scheme regulating sexually oriented businesses. In upholding the "core principle" of *Freedman*, six Justices of this Court concluded that *Freedman*'s requirement of prompt judicial review remained an "essential" safeguard in combating the unconstitutional suppression of speech. 493 U.S. at 228. Nevertheless, several circuits, and the Wisconsin Court of Appeals in the instant case, concluded that *FW/PBS* relaxed the prompt judicial review safeguard and that, in the context of an ordinance regulating sexually oriented businesses, mere access to a judicial forum was all that this Court's precedents require.

These courts are incorrect. Both *Freedman* and *FW/PBS* made clear that a statute conditioning the right to speak on the receipt of a license must ensure a prompt judicial decision, not merely access to a judicial forum. These cases correctly recognize that the scope of First Amendment rights, and thus the propriety of any government regulation of them, is fundamentally an issue for the courts. Any scheme that fails to require prompt judicial review of a license denial not only delays the right to speak in the event that the denial was erroneous, but, more important, increases the risk that, due to delay, the licensor's "determination may in practice be final." *Freedman*, 380 U.S. at 58. The arguments for relaxing this prompt judicial review requirement fail to take into account these risks of delay, and provide no basis for this Court to revisit and weaken well-established principles designed to protect constitutional rights against administrative overreaching.

ARGUMENT

THE WAUKESHA ORDINANCE IS AN INVALID PRIOR RESTRAINT BECAUSE IT FAILS TO ASSURE A PROMPT JUDICIAL DETERMINATION OF THE PROPRIETY OF THE CITY'S REFUSAL TO GRANT A LICENSE TO AN ADULT-ORIENTED BUSINESS.

This case presents a narrow but fundamental question: whether a licensing scheme that acts as a prior restraint on constitutionally protected speech is invalid unless it ensures that a license denial will be reviewed by a court in a timely manner. That question must be answered in the affirmative. As this Court has repeatedly recognized, "[a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. City of Dallas*, 493 U.S. 215, 225 (1990) (plurality opinion) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)) (alteration in *FW/PBS*). A licensing scheme that acts as a prior restraint by prohibiting a business engaged in expressive activity from operating altogether can be as effective a tool of censorship as direct censorship itself. And because businesses cannot survive if they cannot operate, without prompt judicial review to reverse erroneous license denials or revocations, the prior restraint these licensing decisions impose may easily and quickly become a permanent restraint on protected speech.

Accordingly, this Court should affirm the requirement announced in *Freedman v. Maryland*, 380 U.S. 51 (1965), and declared "essential" in *FW/PBS*, 493 U.S. at 228, that a licensing regime that acts as a prior restraint must be promptly reviewed by a court if it is to pass constitutional

muster. Because the Waukesha licensing ordinance "exists as a prior restraint on businesses purveying sexually explicit but protected speech," *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 876 (Wis. Ct. App. 1999), but does not provide for prompt judicial review of licensing decisions, it should be invalidated.

A. This Court's Decisions in *Freedman* and *FW/PBS* Mandate That a Licensing Ordinance Provide for a Prompt Final Judicial Decision on the Merits of Any License Denial.

The framework for analyzing this case is well-established. In *Freedman*, this Court recognized the very real risks to protected speech that a system of administrative prior restraints imposes. A censor "may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression," and thus judicial review of decisions imposing a prior restraint on speech is critical. 380 U.S. at 57-58; *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (noting that "the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable"). Moreover, "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Freedman*, 380 U.S. at 58.[2] Accordingly, the *Freedman* Court adopted procedural

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[2] *See also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963) ("We have tolerated such a system [of prior administrative restraints] only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."), citing *Kinglsey Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Action for Children's*

safeguards that must be employed when the government acts to censor speech directly:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Southeastern Promotions, 420 U.S. at 560 (summarizing *Freedman* requirements); *see also Freedman*, 380 U.S. at 59 (reiterating that a licensing "procedure must . . . assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license").

In the wake of *Freedman* this Court has repeatedly reaffirmed both the need for judicial review of governmental decisions suppressing speech, and the need for such review to be quickly completed. *See, e.g., Southeastern Promotions*, 420 U.S. at 560 ("a prompt final judicial determination must be assured"); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 367, 371-74 (1971) (requiring safeguards that ensure that "administrative delay does not in itself become a form of censorship," including time limits for completion of judicial proceedings in obscenity forfeiture

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Television v. FCC, 59 F.3d 1249, 1260 (D.C. Cir. 1995) ("The lesson of *Bantam Books* is that the state may not move to suppress speech by means of a scheme that, as a practical matter, forecloses the speaker from obtaining a judicial determination of whether the targeted speech is unprotected, lest the state be able effectively to suppress protected speech.").

cases); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (requiring "a final judicial determination on the merits within a specified, brief period"); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n.22 (1968) (*Freedman* satisfied by statute requiring judicial determination within nine days of administrative decision). These cases made clear that the scope of the First Amendment's protections is a question for the courts and that any scheme censoring speech due to its content must therefore ensure a prompt judicial determination of the propriety of that regulation.

Twenty-five years after *Freedman* was decided, this Court reviewed an ordinance strikingly similar to that presented in this case. In *FW/PBS*, 493 U.S. 215, the Court, in a series of separate opinions, struck down portions of an ordinance which imposed licensing requirements on adult entertainment establishments. Three justices, in an opinion authored by Justice Brennan, reasoned that the full panoply of protections required by *Freedman* apply in this context, and that the ordinance failed to conform to those safeguards. 493 U.S. at 239-41 (Brennan, J., concurring). In an opinion written by Justice O'Connor, three other members of the Court, reasoning that the ordinance involved only the "ministerial action" of "review[ing] the general qualifications of each license applicant" rather than "passing judgment on the content of any protected speech," *id.* at 229, concluded that the first *Freedman* safeguard – that the government institute a judicial proceeding and bear the burden of proving that certain material is unprotected – was unnecessary. *Id.* at 229-30.

Justice O'Connor's opinion also recognized, however, that, as with a censorship system, "a licensing scheme creates the possibility that constitutionally protected speech will be

suppressed" absent adequate procedural safeguards. *Id.* at 226. Accordingly, the "core policy" underlying *Freedman*, "that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech," *id.* at 228, applies with equal force to censorship systems and to licensing schemes. Therefore, these three Justices concluded, the remaining *Freedman* safeguards not only apply, but "are *essential*: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228 (emphasis added) (*citing Freedman*, 380 U.S. at 51).

In the wake of *FW/PBS*, four Circuit Courts of Appeals and the Wisconsin Court of Appeals have concluded that, although this Court deemed at least two *Freedman* requirements "essential," it nonetheless "relaxed," without discussion, the requirement that administrative prior restraints be subject to prompt judicial review. *See City News & Novelty*, 604 N.W.2d at 881 (mere availability of judicial review of an administrative restraint satisfies "prompt judicial review" requirement); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999); *TK's Video, Inc. v. Denton Cty.*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (plurality opinion) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). Three other Circuits have flatly disagreed, concluding that "Part II of Justice O'Connor's opinion did not relax the *Freedman* prompt judicial review requirement." *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58

F.3d 998, 999 (4th Cir. 1995) (en banc); *accord Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000) ("[A] system of prior restraint that fails to ensure a reasonably prompt decision by a judicial officer cannot be squared with the First Amendment."); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998) ("prompt judicial review" requires both a hearing and a prompt decision by judicial officer); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995) (same). As set out below, the Fourth, Sixth and Ninth circuits are correct.

Although the cases concluding that mere access to a judicial forum is sufficient after *FW/PBS* are not models of clarity, they appear to rely on Justice O'Connor's use of the phrase "possibility of prompt judicial review," 493 U.S. at 228, rather than the phrase "assure a prompt final judicial decision" that was used in *Freedman*, 380 U.S. at 59. *See Boss Capital*, 187 F.3d at 1255; *TK's Video*, 24 F.3d at 709. But these two phrases do not reflect substantive differences. Indeed, *Freedman* itself used the phrases "prompt judicial review" and "prompt judicial determination" interchangeably, 380 U.S. at 56-60, as have numerous cases since. *See Southeastern Promotions*, 420 U.S. at 561-62 (holding that "board's system did not provide a procedure for prompt judicial review" where judicial determination on merits was not obtained for more than five months); *Thirty-Seven Photographs*, 402 U.S. at 367-70 (using term "prompt judicial review" as synonymous with "prompt judicial decision"); *Blount*, 400 U.S. at 417 (summarizing *Freedman* as holding that, "to avoid constitutional infirmity a scheme of administrative censorship must . . . require 'prompt judicial review' – a final judicial determination on the merits within a specified, brief period").

Moreover, given the thoroughness with which Justice O'Connor explained her view that the first *Freedman* safeguard was unnecessary in the context presented there, *see* 493 U.S. at 228-30, and the degree to which that analysis was the subject of division on the Court, *see, e.g.*, 493 U.S. at 240-41 (Brennan, J., concurring in the judgment), it is utterly implausible that Justice O'Connor intended to relax the third *Freedman* safeguard, without analysis, solely by means of a minor change in phrasing. Indeed, Justice O'Connor's opinion deemed the requirement of prompt judicial review "essential" – citing *Freedman* itself for support, *FW/PBS*, at 228.[3]

Finally, and critically, the holding of *FW/PBS* confirms that the third *Freedman* safeguard remained unchanged. Having held that the "prompt judicial review" safeguard was mandatory, Justices O'Connor, Stevens, and Kennedy joined a majority of the Court in striking down the ordinance under review for failing to provide such a safeguard, even though, as Justice White noted in dissent, "no one suggests that licensing decisions are not subject to immediate appeal to the courts." *Id.* at 248 (White, J., concurring and dissenting). If the "prompt judicial review" requirement meant the mere access to a judicial forum, the Court in *FW/PBS* would have upheld the ordinance because a party denied a license had access to such a forum. In short, *FW/PBS* cannot plausibly

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[3]In any event, Justice O'Connor's opinion spoke for only three Justices of the Court. *See FW/PBS*, 493 U.S. at 238-42 (Brennan, J., concurring in the judgment) (all three *Freedman* safeguards apply). Thus, the Court's holding is the narrowest ground on which the case was decided – which was that the challenged ordinance did not provide adequate procedural safeguards. *See, e.g. Marks v. United States*, 430 U.S. 188, 193 (1977); *11126 Baltimore Blvd.*, 58 F.3d at 999.

be read to relax the requirement in *Freedman* that a licensing scheme provide for a prompt judicial determination.

B. The Requirement of a Prompt Judicial Determination is Essential to Ensure That a Licensing Scheme Will Not Suppress Constitutionally Protected Speech.

This Court was correct in holding that a scheme that conditions the right to engage in expressive activity on the receipt of a license must be subject to prompt judicial review, and it should not now alter or abandon that requirement. Ours is a society that places paramount value on the ability to think and speak, free from unwarranted government interference. Because a free society "prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," *Southeastern Promotions*, 420 U.S. at 559, any law conditioning the right to speak on the permission of government officials must contain safeguards to ensure that protected speech is not wrongfully suppressed. *See FW/PBS*, 493 U.S. at 226-27; *Freedman*, 380 U.S. at 56-57.

One "evil" that such safeguards must protect against is the ability of the government to make a prior restraint permanent by delaying its decision on whether to issue the necessary license. *See FW/PBS*, 493 U.S. at 227 ("A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech."). Thus, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* at 226. But requiring the decisionmaker merely to act quickly does not adequately protect speech. Mindful of the risk that the decisionmaker –

even if acting quickly – may wrongly deny the license, courts have unwaveringly concluded that the denial must not be the last word on the subject. Instead, it is the judiciary that must make the determination whether a licensing decision that serves as a prior restraint on speech is appropriate. *See Freedman*, 380 U.S. at 58 ("only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression"); *see generally* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 55 (1984) ("The requirement of a full and fair hearing before an independent judicial forum for the adjudication of constitutional rights is a widely accepted premise of modern constitutional thinking."). Thus, the decision on a license application must be coupled with prompt judicial review of that decision.

These two requirements work in conjunction to ensure that speech is not wrongfully, and, even worse, permanently, suppressed. Without a requirement that a licensing decision be made within a reasonable time period, speech could be restrained indefinitely by the licensor's mere inaction. *See, e.g., 11126 Baltimore Blvd.*, 58 F.3d at 996; *FW/PBS*, 493 U.S. at 227. In such a case, the availability of prompt judicial review of a licensing decision would be meaningless. Similarly, the requirement that a licensing decision be made quickly would be small comfort to a license applicant if review of that decision could be delayed for months, or years. Even if the license applicant could prove with certainty that the denial was erroneous, if such judicial review does not occur quickly, there is a very real risk that the licensor's erroneous decision will, in effect, be final. *See*

Freedman, 380 U.S. at 58-59.[4] Thus, the "two *Freedman* safeguards work together to ensure that the entire review process will be expeditious" and meaningful. *Nightclubs, Inc.*, 202 F.3d at 893; *see generally* Lawrence H. Tribe, *American Constitutional Law* § 12-37, at 1055 (2d ed. 1988) (because of "judicial primacy in first amendment jurisprudence," Court has invalidated "any system which allows administrative determinations either directly or indirectly to determine *finally* the scope or application of first amendment privileges").

Access to a judicial forum alone is plainly insufficient to forestall the "effect of finality" that a licensor's decision would otherwise have. *Freedman*, 380 U.S. at 58.[5] Even "prompt" access to a judicial forum does not ensure that resolution will be prompt, and therefore does nothing to

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[4]While City News itself has pursued its case through the levels of court, this Court's jurisprudence in this area has never focused on whether the party before it actually was able to stay in business during the period of the prior restraint, because the fact that the case is even before it means that the license seeker was able to challenge the denial or suspension to the Supreme Court. Rather, the Court's concern is with the number of cases that neither it nor any other court will ever see. *See, e.g., Freedman*, 380 U.S. at 59 (noting that, absent procedural safeguards, aggrieved parties may lack incentives to challenge license denials).

[5]As an initial matter, such a "requirement" would not add anything and it would be meaningless for this Court to have mandated it and deemed it "essential." All litigants possess the right to challenge a statute – even if it does not impose a prior restraint – on constitutional grounds. *See Nightclubs, Inc.*, 202 F.3d at 893; *Baby Tam & Co.*, 154 F.3d at 1101 ("prompt judicial review" requirement meaningless if mere access to judicial review were sufficient, because "'[a] person always has a judicial forum when his speech is allegedly infringed'") (quoting *Graff*, 9 F.3d at 1324 (plurality op.)).

prevent a wrongful restraint on speech that lasts for months or years. In the instant case, for example, a full 17 months elapsed between City News's application for a license and the first judicial decision on the merits. *See City News & Novelty*, 604 N.W.2d at 875-76. Nothing in the Wisconsin Court of Appeals' decision indicates that proceedings in this case were unusually protracted, and statistics from state courts across the country indicate that such delays are not uncommon. *See Examining the Work of State Courts, 1998: A National Perspective for the Court Statistics Project* 38-39 (Brian J. Ostrom & Neal B. Kauder ed., 1999) (civil trials in state courts average 22 months from filing to disposition).[6] In the context of a restraint on protected speech, such delays are devastating. Quite apart from the fact that *any* delay in the exercise of First Amendment rights constitutes irreparable harm,[7] a muzzle on speech that lasts for months

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[6]Although City News itself was allowed to continue operating during the pendency of this case, nothing in the statute mandates such a stay. Accordingly, the statute itself still "gives rise to the possibility of the suppression of protected expression before judicial review of the case on the merits, and is therefore contrary to the principles which underlie the procedural safeguards set forth in *FW/PBS*." *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1116 (9th Cir. 1999).

[7]*See Freedman*, 380 U.S. at 61 (if statute does not require prompt judicial determination, "the victorious exhibitor might find the most propitious opportunity for exhibition pas[sed]"); *see also, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162-63 (1969) (Harlan, J., concurring) (delay in exercise of First Amendment rights in itself burdens them and may risk their destruction); *cf. City of Houston v. Hill*, 482 U.S. 451, 467-68 (1987) (explaining Court's reluctance to abstain in cases that raise facial challenges to statutes under First Amendment, noting that allowing claimant to "suffer the delay of

as a case challenging denial of a license winds its way through the "protracted and onerous course of litigation," *Freedman*, 380 U.S. at 59, will frequently result in a total denial of speech. A prospective bookstore may well abandon its plan to open if it is prohibited from doing so for months or years. An existing business that has to close because its license is revoked or not renewed may well not have the means to continue fighting the licensing decision through the judicial system – especially given that the closure denies it of revenue. The only practical alternative for many of these businesses is to steer far clear of the underlying statutory provisions, thus bringing about the "chilling" of speech that the prior restraint doctrine seeks to avoid. *See Southeastern Promotions*, 420 U.S. at 559.

The Courts of Appeal that have effectively eliminated the judicial review requirement have not attempted to grapple with the harm such delay imposes. Instead, they have focused on factors that are uniformly irrelevant to the need for procedural safeguards. Some courts, for example, appear to rely on the fact that the licensing scheme at issue is content-neutral. *See Boss Capital*, 187 F.3d at 1256; *Graff*, 9 F.3d at 1331-33 (Flaum, J., concurring); *see also TK's Video*, 24 F.3d at 708.[8] Even if true, this does not alter the need for

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state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect") (quotation and citation omitted); *Martin Tractor Co. v. FEC*, 627 F.2d 375, 380 (D.C. Cir. 1980) (noting chilling effect on protected expression that delay might produce).

[8]Although the Fifth Circuit noted the "content-based" restrictions of other cases, it rejected *Freedman*'s requirement of a prompt judicial determination primarily on the basis that "[a] 'brief period' within which all judicial avenues are exhausted would be an oxymoron." *TK's Video, Inc.*, 24 F.3d at 709. But this Court has never required that all judicial

prompt judicial review. Indeed, *FW/PBS* itself involved a regulation that was no less content-neutral than the ordinance at issue here, and was nonetheless deemed constitutionally infirm because it "fail[ed] to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *FW/PBS*, 493 U.S. at 229; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 n.4 (1969) (content-neutral regulation must provide for "expeditious judicial review"). That is not to dispute, of course, that content-neutral regulation is subject to a lower constitutional standard, and *a fortiori* is more likely to be valid in the abstract, than content-based regulation. But even a statute limited to "mundane" content-neutral factors runs the risk that the factors will be applied improperly or that the factors themselves, however "mundane," do not justify the regulation of particular expressive activity. The danger of prior restraints arises not from the basis on which a government official denies a license, but from the possibility that, absent an assurance of prompt review, there will be no judicial determination of whether that denial was proper – resulting in the wrongful suppression of protected speech. Thus, the relevant question is not whether the underlying regulation is within the proper scope of government regulation, but whether the determination of whether the regulation was properly applied will be decided quickly enough to prevent the erroneous denial from becoming

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proceedings, including relevant appeals, must conclude within that brief period. Rather, the Court has required only a decision by a trial court in an adversary hearing. *Interstate Circuit*, 390 U.S. at 690 n.22; *Baby Tam & Co.*, 154 F.3d at 1102 (the term "final" means "that a judicial officer should make the final decision denying a license rather than a state censor . . . . It does not refer to a court's decision itself becoming final through various rehearing and appellate procedures.").

permanent. It is for this reason that a licensing ordinance, even if providing narrow standards, violates the Constitution if it does not *also* provide the procedural safeguards that *Freedman* mandates. *See FW/PBS*, 493 U.S. at 226-30 (invalidating licensing ordinance under *Freedman* despite claim that ordinance is content-neutral); *Shuttlesworth*, 394 U.S. at 155 & n.4 (content-neutral ordinance restraining speech must make available "expeditious judicial review"); *see also Southeastern Promotions*, 420 U.S. at 552 (refusing to reach question whether prohibited speech was obscene because system was "lacking in constitutionally required minimal procedural safeguards"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64 (1988) (even if "government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion"; otherwise, official may make decision of "who may speak and who may not based on the content of the speech or viewpoint of the speaker"); *see generally* Tribe, *supra*, § 12-37 & -38, at 1054-57 (noting concerns that "an administrative censor is unlikely to be sensitive to the values of freedom of expression" and that an administrative official will use licensing power to discriminate based on content through selective enforcement of regulatory power).

Nor does the fact that "applicants for adult entertainment licenses . . . have every incentive to stick it out and see litigation through to its end," *Boss Capital*, 187 F.3d at 1256, justify abandoning the requirement of prompt judicial review. In *FW/PBS*, Justice O'Connor reasoned that, because the viability of an entire business is impacted by a licensing scheme, an applicant denied a license will invariably initiate court proceedings to challenge the denial –

thus rendering unnecessary *Freedman*'s command that the licensor bear the burden of going to court. 493 U.S. at 229-30; *cf. Freedman*, 380 U.S. at 61 (refusing to set forth rigid procedures for accomplishing safeguards). But the judicial remedy sought by the potential licensee must be effective to be meaningful and, as discussed above, review may well be meaningless unless the court proceedings produce a quick decision. *See Baby Tam & Co.*, 154 F.3d at 1101-02 ("judicial review" entails both consideration and a decision; "[w]ithout consideration, there is no review; without a decision, the most exhaustive review is worthless").

Finally, the fact that a "municipality does not have the authority to direct a state judicial court to issue a decision within a specified period of time," *City News & Novelty*, 604 N.W.2d at 882, is irrelevant to the question of whether the Constitution compels a prompt decision. If a municipality cannot ensure prompt judicial review, the remedy is to invalidate the licensing ordinance, not to relax the constitutional requirement. *See Graff*, 9 F.3d at 1341 (Cummings, J., dissenting) ("[S]ince when does a city gain special dispensation to violate the United States Constitution because a state law contradicts it? Under the Supremacy clause, the state law must give."). In any event, this reasoning does not support the Wisconsin Court's interpretation of the "prompt judicial review" requirement: just as a municipality cannot direct a state court to issue a decision within a specified period of time, it also cannot grant that court jurisdiction to review the municipality's licensing decision. Only the state legislature has these powers. *See Nightclubs*, 202 F.3d at 893 & n.10 (both the availability of judicial review and the speed within which certain cases must be resolved are dependent upon state law). There is no reason that a city – due to its claimed

powerlessness to comply with *Freedman* – should be excused from its constitutionally imposed requirements, especially where a state government enacting precisely the same law would not be so exempt.

Moreover, even though a city cannot alone ensure a prompt judicial determination, it is not powerless to bring its licensing scheme in compliance with *Freedman*'s commands. For example, an ordinance may provide that a license denial or revocation goes into effect only upon a judicial determination affirming the denial or revocation of a license, *see Nightclubs*, 202 F.3d at 894; *11126 Baltimore Blvd.*, 58 F.3d at 1001 n.18, and could provide provisional licenses to new applicants pending judicial review of license denials, *see Nightclubs*, 202 F.3d at 894. Indeed, such an approach avoids altogether the risk of delay that administrative restraint poses. *See, e.g., 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (*Freedman* requirement could be met where a licensing scheme provides "for an automatic stay [of a license suspension or revocation] pending a judicial decision"); *Nightclub Management, Ltd. v. City of Cannon Falls*, 95 F. Supp. 2d 1027, 1036 (D. Minn. 2000).

A city could also take measures short of abandoning the prior restraint aspect of its licensing statute altogether. A city could, for example, "provide that a license shall issue if a reviewing court fails to reach a decision within a reasonably brief period of time," *Nightclubs*, 202 F.3d at 894, and could petition the reviewing court for expedited briefing or hearing in cases where a frustrated license applicant seeks judicial review. In addition, a city could petition its state legislature to pass laws obligating state courts to resolve municipal administrative appeals, or

appeals raising First Amendment issues, within a brief period. *Id.*; *see generally* Sandra C. DiGiulio, *Expedited Judicial Review Ensures that Restraints On the Adult Entertainment Industry Pass Constitutional Muster*, 31 McGeorge L. Rev. 623, 629-32 (2000) (discussing new California statute creating "an expedited judicial review process to appeal a local administrative revocation, suspension or denial of a permit or other entitlement for expressive conduct protected by the First Amendment"). In short, even if a city's purported lack of power were relevant to the constitutional validity of a city's ordinance, cities are not powerless to meet the procedural safeguards set forth in *Freedman*.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Court of Appeals upholding Waukesha's licensing ordinance should be reversed.

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No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF WISCONSIN

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, AND PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.6 of the rules of this Court, counsel for the *amici curiae* discloses that he authored the brief in whole. No person or entity, other than Media Coalition, Inc., a trade association of which *amici curiae* are members and of which the parties are not members, made a monetary contribution to the preparation or submission of the brief.

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OF WISCONSIN

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom to Read Foundation ("FTRF"), International Periodical Distributors Association, and Periodical and Book Association of America, Inc. submit this joint amicus brief in support of petitioner, urging that this Court find the ordinance in question to be constitutionally

infirm and to reverse the decision of the court below.[1] This brief is submitted upon written consents of counsel to petitioner and respondent. Petitioner's consent is submitted herewith; respondent's consent has previously been filed with the Court.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") publish, distribute, sell and are consumers of books, magazines, videos, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers.

Zoning and business regulatory ordinances relating to the sexually explicit nature of products sold or displayed by retail establishments are proliferating. In many cases these ordinances purport to apply even to retailers whose predominant product lines have no sexual content, explicit or otherwise. *Amici* are mainstream providers of speech in a variety of fora and media. They are concerned that, unless regulatory ordinances expressly provide for maintenance of the status quo pending judicial review of whether an existing establishment requires and is entitled to a license or complies with a zoning regulation, these ordinances inevitably will have the effect of chilling the dissemination of First Amendment-protected material. In addition, absent a stay or other provision maintaining the status quo, ultimate judicial vindication may come only after the Draconian closure of a retailer, preventing distribution of First Amendment-protected materials during the review period.

Amici submit this brief to highlight the very real danger of zoning and business licensing ordinances being used to target unpopular speech, if a communicative business can be closed prior to the culmination of judicial review. When government restricts politically disfavored but constitutionally protected speech – such as the speech at issue here -- it violates the rights not only of the restricted creators and distributors, but also of mainstream

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[1] A description of the *amici* is attached as Appendix A.

consumers who avail themselves of a wide variety of materials and who would rather discriminate in their consumption themselves than allow the government to dictate those choices.[2]

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1998); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham*, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979).

SUMMARY OF ARGUMENT

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural limitations on the operations of a censorship board decision-maker are required by the First Amendment. Many of these limitations relate to the imposition of discrete time limits so that unreviewable censorship is not achieved by inaction. This Court subsequently held in *FW/PBS, Inc. v. City of Dallas* that at least two of these limitations – that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained and that expeditious judicial review be available – apply equally to licensing of businesses that sell First Amendment-protected materials. 493 U.S. 224, 228 (1990)

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[2] The Court has assiduously protected the "right to receive information and ideas." *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 (1980); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

It is undisputed that neither the Waukesha ordinance at issue here, nor the related Wisconsin statute, imposes any time limit on the available judicial review; there is no requirement of expeditious judicial review. Nor do they require maintenance of the status quo during the judicial review period so that the retailer can avoid premature and possibly wrongful closure.

It is both intolerable and unconstitutional to permit an existing business selling First Amendment-protected material to be closed pending judicial review of a decision to revoke or deny a business license. Even if the courts subsequently reverse such revocation or denial, the business' First Amendment rights will have been infringed, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)

Further, as a practical matter, permitting the revocation or denial to become effective during the period of review by the courts requires the business either to close, or to self-censor all of the First Amendment-protected materials that might possibly bring it within the purview of the regulatory statute or ordinance, since even temporary closure will impose grievous, if not fatal, economic harm on such a business.

ARGUMENT

THE STATUS QUO MUST BE MAINTAINED PENDING JUDICIAL REVIEW OF THE DENIAL OR REVOCATION OF A BUSINESS LICENSE TO AN EXISTING BUSINESS DEALING IN FIRST AMENDMENT-PROTECTED MATERIALS

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural limitations on a censorship board decision-maker are required by the First Amendment. Many of those limitations relate to the imposition of discrete time limits so that censorship is not achieved by inaction. This Court

subsequently held in *FW/PBS, Inc. v. City of Dallas* that at least two of these limitations – that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained and that expeditious judicial review be available – apply to the licensing of communicative First Amendment-protected businesses. 493 U.S. 224, 228 (1990)

The Waukesha ordinance at issue in this case (§ 8.195, Municipal Code of Waukesha, Wisconsin) does not provide for judicial review. The relevant review provision is found in the municipal administrative procedure provisions of state law, which gives a party 30 days to seek review by certiorari. Wis. Stat. § 68.13. There is, however, no provision imposing a time limit for a decision, or even requiring expeditious review. Nor is there any requirement for the maintenance of the status quo while judicial review is pending.

Under *Freedman*, a "prompt final judicial decision" is required. 380 U.S. at 59. Similarly, *FW/PBS* requires "prompt judicial review in the event that the license is erroneously denied." 493 U.S. at 228. The procedures applicable in this case are constitutionally deficient under both these tests.

Some courts have read the *FW/PBS* test to require only prompt access, i.e., to prohibit preventing petitioner from requesting such review for some period of time. *See, e.g., Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255 (11th Cir. 1999). This is an untenable interpretation which fails to comply with both the language and intent of this Court. *See, e.g., Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998).

Prompt access alone is a meaningless right. When a retailer is faced with closing, the ability promptly to file for judicial review has little value unless accompanied by a prompt decision and an intermediate stay. A prompt filing followed by a judicial reversal two years later does not adequately protect the First Amendment rights of the vindicated business. Counsel for *amici* is unaware of any judicial system which grants judicial

review but prevents petitioner from requesting such review for some period of time. And few, if any, administrative procedures impose a delay between the issuance of a denial and issuance of the final appealable order. Thus a "right" to prompt access is always available, but gives the petitioner nothing of value.

As the Ninth Circuit pointed out in *Baby Tam*,

> The phrase "judicial review" [in *FW/PBS*'s requirement of "prompt judicial review"] compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klein once said to an inquisitive catcher: "It ain't nothin' till I call it." This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'.

154 F.3d at 1101-02.

Rather, to effectuate the intent of both the *Freedman* and *FW/PBS* Courts, and to protect First Amendment rights, there must be a prompt decision, so that the vendor of First Amendment-protected material is not left in limbo. In such a case, even more than usual, the adage that "justice delayed is justice denied" is applicable, particularly since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm."" *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Amici would be directly affected by the absence of such a safeguard. *Amici* include general bookstores and other retailers of constitutionally protected communications. *Amici* do not include

"adult" retailers as that term is commonly used, but rather mainstream establishments, whose predominant products are not sexually explicit or even sexually related, although many stock some products which could be considered relevant under typical zoning or business license ordinances. However, ordinances that potentially apply to such mainstream establishments are proliferating.

Municipalities have attempted to apply such ordinances to retailers whose stock consisted of as little as 3% and 10% sexually explicit material. *City of Columbia v. Pic-A-Flick Video, Inc.*, No. 25113, 2000 WL 460496, at *1 (S.C. 2000) (3%); *World Wide Video v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991) (10%). In yet another case, such an ordinance was applied to a general pharmacy and drug store which devoted less than 5% of its store to videos, only some of which were "adult". *Brown v. Pornography Commission of Loan Southhampton Township*, 620 F.Supp. 1199, 1203-4 (E.D. Pa. 1985). While such applications were held to be unconstitutional, it is notable that in all three cases the retailer was vindicated only after judicial review. And the application of such ordinances to retailers 40% of whose stock could be considered sexually explicit has been upheld. *See, e.g., ILQ Investments v. City of Rochester*, 25 F.3d 1413, 1415 (8th Cir. 1994).

Further, even if a prompt decision is required, and even more so if it is not, an existing seller of First Amendment-protected materials must be permitted to remain open pending judicial review of a decision to revoke or deny a business license, or of a decision to shutter the establishment because of an alleged zoning violation. To do otherwise would be to infringe the retailer's First Amendment rights, even if judicial review subsequently reverses the revocation or denial. The closing of any retail establishment obviously has a major impact on its business, from which it may never recover, even if it is subsequently permitted to reopen. Furthermore, during the closure period, the retailer will not know whether or when it may reopen. The only practical alternative for the retailer would be to self-censor by eliminating from its stock the First Amendment-protected materials which might possibly bring the establishment within the purview of the regulatory statute or ordinance. In either event,

First Amendment rights are chilled, a prior restraint is achieved, and protected materials are not available at the location. That is not a result anticipated or permitted by *Freedman*, *FW/PBS* and the First Amendment.[3]

CONCLUSION

Amici urge this Court to reverse the decision below on the ground that the Waukesha ordinance and Wisconsin statutes neither require a prompt judicial review determination, nor require maintenance of the status quo pending such determination.

Dated: August 25, 2000

Respectfully submitted,

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[3] Nor is it enough that, as here, a stay is granted in a particular case, although not mandated by law. *Freedman* requires that the limits "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). Otherwise the retailer, not knowing whether the status quo will be maintained, will be forced to self-censor to avoid the possibility of closure.

APPENDIX A: THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 270 members include most of the major commercial book publishers in the United States. AAP members publish most of the general, educational, and religious books produced in the United States.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

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On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF AMICUS CURIAE OF AMERICAN CHARITIES FOR REASONABLE FUND RAISING REGULATION, INC. IN SUPPORT OF PETITIONER

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INTRODUCTION[1]

The speech purveyed by adult bookstores such as Petitioner City News and Novelty (hereinafter, CNN) stands as a lonely sentinel on the outer perimeter of the First Amendment. But, just as the attack on the outpost of Pearl Harbor nearly two decades prior to statehood for Hawaii was correctly perceived as an attack on all Americans, so too is an attack on CNN's free speech rights an attack on all Americans committed to the First Amendment.

Unlike Petitioner CNN, amicus curiae American Charities for Reasonable Fundraising Regulation, Inc. (hereinafter, "ACFRFR") is not an adult business, nor are any of its members adult businesses. ACFRFR and its members engage in a much more popular form of speech – charitable speech. Many believe that such speech is qualitatively more important than the speech purveyed by adult businesses such as CNN, and there is language in some of this court's decisions which lends support to that evaluation. However, while the First Amendment allows ACFRFR (as well as all private citizens of the United States) to make such a determination, it specifically prohibits the government from ever making that same determination. The First Amendment cannot be selectively applied, for in order for it to mean anything it must apply to everyone. To paraphrase Voltaire, while

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ACFRFR may disagree with the message purveyed by those such as CNN, it will fight side by side with CNN to protect CNN's right to engage in such speech activities.

The true test of a principle comes when it is applied to its least popular situation in a given context. One encounters the phrase "bedrock principle" often when reading Supreme Court decisions involving the First Amendment. However, the use of the second word in that phrase makes the first superfluous, for a principle must be firm lest the principle be surrendered in favor of the whim of the decisionmaker. It is for this reason that ACFRFR submits the following brief.

INTEREST AND IDENTIFY OF AMICUS CURIAE

ACFRFR is a Delaware nonprofit corporation with offices located in Virginia. It is a membership organization representing the interests of charities and the philanthropic community as a whole. ACFRFR's members include charities that communicate their messages throughout the United States. Its purposes include engaging in litigation to protect the constitutional interests of all of its members.

Charities, almost by definition, are dependent upon the goodwill of prospective donors in the general public. As such, they are very concerned with public perceptions, and threats of criminal and civil enforcement actions by government officials are taken very seriously. Charities attempt to comply with all government regulation if at all possible, even where such compliance is onerous and

even when such compliance calls into question fundamental but abstract constitutional guarantees. The price of being a "test case" can be the loss of the charitable organization's reputation and goodwill with the public while the organization seeks to protect its rights through legal action. Even if ultimately vindicated, such a victory may be a pyrrhic one if the donating public only remembers the press releases issued by overzealous government regulators. Once the donating public associates a charitable organization with the images of fraud contained in an Attorney General's statement to the press, that may well be all the public remembers when it channels charitable donations to other "safer" organizations that have not raised the ire of government officials.

Of particular concern to ACFRFR and the charitable community as a whole has been the recent erosion of the First Amendment principles established in *Freedman v. Maryland*, 380 U.S. 51 (1965). Not long after winning a long and drawn out struggle with government regulators to have courts recognize that charitable messages to the public are imbued with full First Amendment protections, which included all of the *Freedman* protections, government regulators began to chip away at those precious freedoms. Emboldened by the apparent retreat (at least in the adult use context) by some members of this Court from the clear bright line test enunciated in *Freedman*, many charity regulators have stepped up the practice of issuing "cease and desist" letters to charitable speakers. Such "cease and desist" letters demand an immediate cessation of ***all*** charitable speech being purveyed by a particular speaker into the jurisdiction upon mere suspicion by the regulators that the solicitation is improper.

Such demands always come without a stay, and without any time whatsoever for a court to subsequently validate the judgment of the would-be charitable censor.

Moreover, often times the charitable speaker is one who previously had been licensed, but whose license had been "revoked" without any *Freedman* judicial review whatsoever. The regulators know full well that the last thing a charitable organization wants is a front page story in the local newspaper with quotes from local government officials detailing allegations of "fraud," even if they are only allegations. As such, those "cease and desist" letters have an in terroram and chilling effect on the charitable community as a whole, since no charity is willing to go to court to challenge such license revocations as violative of *Freedman* principles. It is this principle which ACFRFR seeks to vindicate on behalf of the philanthropic community as a whole in submitting the instant brief.

ARGUMENT

I. Charitable Solicitations are fully protected core speech entitled to the full panoply of First Amendment protection, including *Freedman* standards

A. This Court's 1980's trilogy imbuing charitable appeals with First Amendment protections

This Court's decision in *Schaumburg v. Citizens for a Sound Environment*, 444 U.S. 620 (1980) established that charitable appeals for funds are fully protected "core speech" for First Amendment purposes. Government

actions that have more than an incidental effect upon such speech are therefore entitled to the highest level of judicial scrutiny.

Four years after this Court decided *Schaumburg*, it decided *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984). That case reaffirmed the *Schaumburg* holding that charitable solicitations are indeed core speech entitled to the highest level of judicial scrutiny, and also established that close solicitation agents of a charity have standing to present those arguments to a court.

The third case in this trilogy was *Riley v. National Federation of the Blind of North Carolina*, 481 U.S. 781 (1988). That case similarly reaffirmed that strict scrutiny must be applied to all government action having a more than incidental impact upon charitable speakers. 481 U.S. at 789. Additionally, *Riley* explicitly stands for the proposition that *Freedman v. Maryland* principles apply in the context of charitable speech. 481 U.S. at 802. This aspect of the *Riley* opinion was followed shortly thereafter in *Famine Relief Fund v. West Virginia*, 905 F.2d 747, 753-4 (4th Cir. 1990) (holding that *Riley* established that *Freedman v. Maryland* principles apply in the charitable speech context).

B. Prior restraints on speech come to this Court with a strong presumption of invalidity

It is well settled law that any prior restraint imposed by government officials upon speech activities violates the rule in *Near v. Minnesota*, 283 U.S. 697 (1931). Such prior restraints are presumptively unconstitutional, and

the government bears a heavy burden in justifying them. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *see also, Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). A prior restraint has an immediate and irreversible sanction on speakers: if the threat of criminal or civil sanctions after publication "chills" speech, a prior restraint "freezes" it, at least for a time. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This reasoning has been held to apply with equal force in the context of charitable speech. *See, Riley, Famine Relief Fund*, and *Keefe, supra*.

Freedman v. Maryland, 380 U.S. 51 (1965) provided a bright line rule for when the government could get away with a prior restraint on First Amendment activities. This Court held in *Freedman* that the following procedural safeguards are essential to protecting First Amendment rights when the government seeks to restrain speech prospectively: (1) the government must bear the burden of persuasion to show that the speech is not protected and of going to court to restrain the speech; (2) only a *judicial* determination suffices to impose a valid final restraint on speech; and (3) the government may only institute a non-final prior restraint on speech for the shortest time possible, so as to maintain the status quo while the would-be censor decides whether to allow the speech or seek a final restraining order from a court. 380 U.S. at 58-9.

This test enunciated in *Freedman* was a bright line test that regulator and regulated alike could easily follow, and which similarly presented few problems to the Courts, at least in the charitable speech context. As mentioned previously, in the charitable speech First Amendment context

that concerns ACFRFR, this Court as well as the Fourth Circuit applied *Freedman* with little or no trouble at all. *See, Munson, Riley, Famine Relief Fund*, and *Keefe, supra*. This bright line rule was the right rule.

Only after this Court's splintered decision in *F/W PBS Inc. v. City of Dallas*, 493 U.S. 215 (1990) did problems begin to arise for charitable speech. Many regulators around the United States have interpreted Justice O'Connor's plurality opinion in *F/W PBS* as a green light for lowering the bar for regulations of not just adult use speech, but for ***all*** speech – even the most strongly protected speech such as charitable and political speech. As will be detailed below, lower courts have begun to use some of this Court's decisions in the adult use context (including *F/W PBS*) to accede to that view.

C. This Court has departed from otherwise clear First Amendment principles in the adult use context, and the abandonment of principle has led to erosion of First Amendment rights in other realms of speech

This Court has sanctioned content based regulations of adult use speech on the grounds that the secondary effects of that speech can properly be regulated by government. *Young v. American Mini Theaters*, 427 U.S. 50 (1976); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). First Amendment "narrow tailoring" and "least restrictive means" principles would generally require the government to simply prohibit and punish those secondary effects rather than restrict the particular type of speech (which inherently makes the restriction content based)

which allegedly gives rise to those effects. *Cf. Posadas de Puerto Rico Ass'n. v. Tourism Co.*, 478 U.S. 328 (1986); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-512(1996) (disavowing secondary effects type analysis approved in *Posadas*).

Instead, this Court has treated such content based regulations of adult use speech under a relaxed, content neutral analysis. *Young* and *Renton, supra; F/W PBS Inc. v. City of Dallas*, 493 U.S. 215 (1990). This Court has held that governments need to be able to experiment to be able to control secondary effects, at least in the adult use context. *Young, supra*, 427 U.S. at 71; *Renton, supra*, 475 U.S. at 50-52.

However, this stands First Amendment principles on their head. As this Court held in *NAACP v. Button*, 371 U.S. 415, 433 (1963) and *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940), it is First Amendment freedoms that need breathing space, not government regulations of those freedoms. To the contrary, governments do not get to experiment with our First Amendment freedoms. Inverting this bedrock First Amendment principle is to sanction censorship by a virtually unlimited government, which would likely have the authors of the First Amendment spinning in their graves.

Once this principle has been abandoned in the adult use context, there is no stopping the erosion of First Amendment protections in other contexts that had been previously based on that principle. Indeed, that has been the experience of both ACFRFR as well as its members in the philanthropic community.

D. Effect of these decisions on the First Amendment protections of charitable speech

The core speech protections for charitable speech won in the *Riley* trilogy have come under siege as a result of the aforementioned adult use decisions. ACFRFR wishes to bring to this Court's attention the following attacks on the First Amendment rights of charities that have resulted from the erosion of the bright line test of *Freedman*: (1) rogue regulators have begun to revoke charitable speech licenses without any judicial process or other *Freedman* safeguards whatsoever, instead simply relying on "cease and desist" orders by State Attorneys General (or their equivalents); and (2) the recent decision of the Tenth Circuit in *American Target Advertising v. Giani*, 199 F.3d 1241 (10th Cir. 2000), which held that charitable speech is entitled to only intermediate level scrutiny rather than strict scrutiny on the basis of this Court's decisions in *Renton* and *F/W PBS, supra*.

1. Issuance of judicially unsupervised "cease and desist" letters to revoke charitable speech licenses

Perhaps the most pernicious development during the past ten years has been the increased frequency with which State and local licensors of charitable speech have dispensed with all *Freedman* factors. Currently, at least forty three states (as well as numerous counties and municipalities) license charitable speech within their

borders.[2] At least seven of those state statutes facially violate *Freedman* in their enforcement sections in that they empower regulators to issue "cease and desist" orders to restrain future charitable messages by a speaker whose

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[2] *See* Ala. Code §§ 13A-9-70 to 13A-9-84 (1998), Alaska Stat. §§ 45.68.010 to 45.68.900 (1998), Ariz. Rev. Stat. Ann. §§ 44-6551 to 44-6561 (1998), Ark. Code Ann. §§ 17-41-101 to 17-41-111 (Michie 1998), Cal. Bus & Prof. Code §§ 17500 to 17510.85, 17200 to 17209 (1998), Cal. Gov. Code §§ 12599 to 12599.5 (1998), Colo. Rev. Stat. tit. 6 art. 16 (1998), Conn. Gen. Stat. §§ 21a-175 to 21a-1901 (1998), Fla. Stat. ch. 496 (1999), Ga. Code Ann. §§ 43-17-1 to 43-17-23 (1998), Haw. Rev. Stat. §§ 467B-1 to 467B-13 (1998), Ill. Rev. Stat. ch. 23 para. 5100-5121 (1998), Ind. Code §§ 23-7-8-1 to 9, 24-5-12-25 (1998), Iowa Code §§ 13C.1 to 13C.8 (1998), Kan. Stat. Ann. §§ 17-1759 to 17-1775 (1998), Ky. Rev. Stat. Ann. §§ 367.650 to 367.670 (Baldwin 1998), La. Rev. Stat. Ann. §§ 1901 et seq. (West 1998), Me. Rev. Stat. Ann. tit. 9, ch. 385 §§ 5001-5016 (1998), Md. Code Ann., Bus. Reg. §§ 6-101 to 6-701 (1998), Mass. Gen. L. ch. 12, § 8 (1998), Mich. Comp. Laws §§ 400-271 to 400-294 (1998), Minn. Stat. §§ 309.50 to 309.72 (1998), Miss. Code Ann. §§ 79-11-501 to 79-11-529 (1998), Mo. Rev. Stat. §§ 407.450 to 407.472 (1998), N.M. Stat. Ann. §§ 57-22-1 to 57-22-11 (Michie 1998), N.Y. Exec. Law Art. 7-A §§ 171-A to 177 (1998), N.C. Gen. Stat. §§ 137-10-015 to 137-10-030 (1998), N.D. Cent. Code §§ 50-22-01 to 50-22-05 (1998), Ohio Rev. Code Ann. §§ 1716-01 to 1716-17, 1716-99 (1998), Okla. Stat. §§ 552.1 to 552.18, 553.3 (1998), Or. Rev. Stat. ch. 137 div. 10 (1998), 10 Pa. Cons. Stat. Ann. Solicitation of Funds for Charitable Purposes Act §§ 162.1 to 162.24 (1998), R.I. Gen. Laws §§ 5-53-1 to 5-53-14 (1998), S.C. Code Ann. §§ 33-56-10 to 33-56-200 (Law Co-op. 1998), Tenn. Code Ann. §§ 48-101-501 to 48-101-522 (1998), Tex. Rev. Civ. Stat. Ann. §§ 9023-1 to 9023-24 (1998), Utah Code Ann. §§ 13-22-1 to 13-22-21 (1998), Vt. Stat. Ann. tit. 9 §§ 2451a to 2479 (1998), Va. Code Ann. §§ 57-48 to 57-69 (Michie 1998), Wash. Rev. Code §§ 434-120-010 to 434-120-350 (1998), W. Va. Code § 29-19-1 to 29-19-15b (1998), and Wis. Stat. §§ 440.41 to 440.48 (1998).

license was only revoked by means of the cease and desist order itself.[3] By statute this occurs without any judicial review whatsoever (prompt or otherwise) of such executive decisionmaking. This amounts to an effective "rule by decree" by charitable speech licensors.

Even in the jurisdictions whose laws facially comply with *Freedman* (in that they purport to require a court to issue such orders rather than the executive enforcers of the statute), the common experience of charities is that regulators issue identical "cease and desist" orders there as in the jurisdictions where they are specifically authorized by statute. Regulators in such jurisdictions do not fear the repercussions of acting either extra-constitutionally or extra-statutorily for the simple reason that they know that charitable organizations are loathe to take them to court. Regulators know that charities depend on the goodwill of their names in the eyes of the donating public, and that mere allegations of "fraudulent" activity by the Attorney General (or his equivalent) are sufficient to deter even the least submissive charitable organizations from risking a lawsuit from the Attorney General – even if the "fraudulent" activity that is at the heart of such a lawsuit amounts to nothing more than a refusal to submit to the unconstitutional demands of the regulator. This practice has increased dramatically during the past decade since this Court's decision in *F/W PBS Inc. v. City*

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[3] *See* Conn. Gen. Stat. 21a-190l(a); Fla. Stat. ch. 496.419(4), (5)(b)(c)(f); Ga. Code Ann. §§ 43-17-7, 43-17-13(a)(1); Ill. Rev. Stat. ch. 23 para. 5109(j); La. Rev. Stat. Ann. § 1909C; Miss. Code Ann. § 79-11-509(4)(a)(b)(c); N.C. Gen. Stat. ch. 131F-23(d)(e); and Wis. Stat. § 440.475(1)(2).

of Dallas, 493 U.S. 215 (1990), which has had the effect of emboldening regulators who believe that the *Freedman* stay pending judicial review is no longer relevant. Of all the issues facing the charitable community, this is the one which most prompts ACFRFR to file this amicus brief.

2. The recent decision of the Tenth Circuit in *American Target Advertising v. Giani*

The Tenth Circuit's decision in *American Target Advertising v. Giani*, 199 F.3d 1241 (10th Cir. 2000) evidences a host of chickens coming home to roost. In that case, a charity engaged in core political speech hired a fundraising consultant, who in turn challenged various provisions of Utah's speech licensing laws as violative of the First Amendment. Early in the opinion, the Tenth Circuit cited *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) for the proposition that charitable speech is only entitled to an intermediate level of judicial scrutiny. 199 F.3d at 1242-3. This is notwithstanding the fact that all three cases of the *Riley* trilogy discussed *supra* clearly hold that regulations of charitable speech must be subjected to the most exacting level of judicial scrutiny. *Riley*, 487 U.S. at 788-9. The Tenth Circuit's rationale relies in part on the secondary effects test of *Renton*: "[t]he Utah Act [at issue] targets the secondary effects of professional charitable solicitations, i.e., increased fraud and misrepresentation." *American Target*, 199 F.3d at 1243. Thus, what started as an exception to traditional content based First Amendment analysis in adult use cases – the "secondary effects" analysis –

has now been interpreted by the Tenth Circuit as a general rule affecting the most sensitive type of political and charitable speech.[4]

Renton is not the only chicken that comes home to roost in the Tenth Circuit's decision in *American Target*, however. The Tenth Circuit also cited *F/W PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) to justify the prior restraint of American Target Advertising's charitable client, Judicial Watch. Again, what started as an exception relaxing First Amendment standards in the adult use context is now applicable to core, political speech engaged in by a charity.[5]

ACFRFR and the philanthropic community as a whole are very concerned by the fact that speech whose First Amendment protection this Court has described as

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[4] American Target Advertising has filed a petition for a writ of certiorari to this Court, asking that the Tenth Circuit's watering down of the level of judicial scrutiny applied to charitable speech be reviewed by this Court. That petition is currently still pending, Case No. 99-1647.

[5] This portion of the Tenth Circuit opinion is parallel to a decision by a federal district court in Florida which similarly held that *F/W PBS* modified *Freedman* in ***all*** speech contexts rather than merely the adult use speech at issue in *F/W PBS*. *See American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 32 F.Supp.2d 1308 (M.D.Fla. 1998), *rev'd* on other grounds, Slip Op. 99-10945A (11th Cir. August 10, 2000). The district court opinion in that case holds even more clearly and with much greater discussion than the Tenth Circuit opinion in *American Target* that *F/W PBS* modified *Freedman* for all speakers, not just those engaged in adult businesses. The Eleventh Circuit opinion in the *American Charities* case summarily dismissed the prior restraint claim without discussion.

"manifest of a wholly different, and lesser, magnitude than the interest in untrammeled political debate" is dragging down the protections afforded to speech that is of self-evidently greater value to the Court. *Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976). ACFRFR urges this Court to adopt the concurring opinion of Justice Brennan in *F/W PBS*, which held that *Freedman* principles must apply to *all* prior restraints that come before the Court. *F/W PBS*, 493 U.S. at 239-242. Justice Brennan correctly noted that this Court's decision in *Riley* mandates application of all three *Freedman* factors, including a stay maintaining the status quo while the government seeks judicial validation for its proposed prior restraint of speech.

Charities all over the United States have been put to a constant state of fear by the erosion of First Amendment protections started in the adult use context. ACFRFR urges this Court to reaffirm the continued vitality of *Freedman* – all three prongs of *Freedman* – in sustaining Petitioner's appeal. Any further retreat from *Freedman* will be used not just to regulate adult businesses, but also to bludgeon the First Amendment rights of relatively defenseless charitable organizations.

CONCLUSION

For all of the foregoing reasons, this Court should sustain the Petitioner's appeal and reverse the decision of the Court below.

Dated this 31st day of August, 2000.

Respectfully submitted,

AMERICAN CHARITIES FOR REASONABLE FUNDRAISING REGULATION, INC.

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No. 99-1680

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Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF WISCONSIN

BRIEF OF FLORIDA CANNABIS ACTION NETWORK, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF POSITION

Florida Cannabis Action Network, Inc. (CAN) is a Florida not-for-profit corporation which engages in political rallies, festivals, signature campaigns and other activities for the purpose of advocating the decriminalization of marijuana and educating the public concerning the medicinal benefits of cannabis. Because CAN frequently faces permitting ordinances similar to the prior restraint at issue here, this amicus brief supports the petitioner in urging the Court to declare that the Waukesha ordinance violates the First Amendment rights of petitioner and others.[1]

Respondent previously filed its blanket consent to amici curiae on July 10, 2000. Petitioner's consent to this amicus brief is submitted herewith.

INTEREST OF AMICUS

CAN is a political organization which sponsors rallies and distributes literature advocating the decriminalization of marijuana and the medicinal benefits of cannabis. Its rallies and festivals typically take place in parks and plazas which are quintessential public fora. Needless to say, the political views of this group are

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[1] This amicus curiae brief was authored entirely by undersigned counsel for CAN. No person or entity other than CAN and its counsel has made any monetary contribution to the preparation or submission of this brief.

controversial and unwelcome in many communities across the country.[2]

In many jurisdictions, CAN must secure a permit in advance of its rally. These permits are often characterized as "parade permits," "festival permits," street-closing permits" or "noise permits". The effect of all of them, however, is to restrain the speaker in the absence of government permission in the form of a license or permit. Not surprisingly, local governments are often reluctant to grant a permit for the dissemination of CAN's controversial message. The result has been a series of lawsuits, where Court intervention was necessary to force local officials to allow political speech. *See, e.g., Michel-Trapaga v. City of Gainesville*, 907 F.Supp. 1508 (N.D.Fla.1995); *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317 (M.D. Fla. 1998). Similar political groups in other states have also been forced to litigate permitting issues in order to hold their parades and rallies. *See, e.g., MacDonald v. Safir*, 206 F.3d 183 (2d Cir. 2000); *MacDonald v. City Of Chicago*, 1998 WL 673652 (N.D. Ill. 1998).

CAN has also been active in securing signatures for a citizen initiative to place a medical marijuana constitutional amendment on the ballot for the next state election. These activities have resulted in a hostile reaction from government, including forced expulsions from public

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[2] Florida, in particular, has many government-sponsored "zero tolerance" programs in schools and communities which advocate "official" positions in opposition to CAN's views.

areas around polling stations. Again, CAN's only recourse has been the federal courts.[3]

CAN's interest in these proceedings is to secure the rights of political dissidents to prompt judicial access - including prompt judicial *disposition* - of permitting decisions affecting political speech. While the petitioner in this case is a business engaged in commercial presentations of adult erotic speech, the Waukesha ordinance is very similar to permitting ordinances routinely encountered by CAN. CAN also seeks to ensure that any weakening of the *Freedman* requirements relative to judicial review is limited to adult erotic speech and that political speech continues to be afforded the highest protection by this Court.

SUMMARY OF ARGUMENT

The seminal case of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965) has been the primary bulwark of free thinkers of all types against the abuses of local permitting officials. Those abuses can hide behind content-neutral permitting ordinances as effectively as the most obvious content-based restrictions. In either case, speech can be stifled in the absence of government permission to speak.

Among the most important of the *Freedman* requirements is that prompt judicial review be available *before* a prior restraint is imposed and that the status quo be

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[3] CAN has been involved in two lawsuits against the City of Jacksonville involving forced expulsion of canvassers from polling stations. Both of these cases settled after litigation was filed.

preserved pending a final disposition on the merits. 380 U.S. at 58-60, 85 S.Ct. at 738-40. As *Freedman* correctly points out "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression..." 380 U.S. at 58, 85 S.Ct. at 739.

This protection is of particular importance when pure political speech is at risk. It is distressingly common for local officials to deny permits for political events on the basis of their own political views, or even a simple desire to avoid the expense and disruption that may accompany a controversial event. *See, e.g., Michel-Trapaga, supra*; *Bledsoe, supra*. Because political issues are often time-sensitive and resources to disseminate minority views are scarce, the denial of a permit often spells the denial of speech. The only significant defense to this indirect censorship is the requirement that the prior restraint be withheld pending a prompt judicial resolution.

In this context, judicial review must include not only access to the Courts, but a disposition of the case on the merits. Absent a final determination, mere access to the Courts does no good to the political speaker who must often espouse his views while events are current or be effectively silenced for all time.

Furthermore, a stay pending review does the political speaker little good as the status quo is equivalent to a denial of speech. That prong of the *Freedman* requirements is important for existing businesses, but cannot help the first time speaker who must obtain government approval before engaging in First Amendment activities.

This Court should vigorously apply all of the *Freedman* requirements, including the right of prompt

judicial disposition on the merits and maintenance of the status quo (where that favors speech). To the extent that this Court may consider weakening any of the *Freedman* standards, it should nonetheless take the utmost care to preserve the rights of political speakers as compared to commercial speakers.

ARGUMENT

THE *FREEDMAN* REQUIREMENTS RELATIVE TO JUDICIAL REVIEW AND MAINTENANCE OF THE STATUS QUO MUST BE PRESERVED, PARTICULARLY WHERE POLITICAL SPEECH MAY BE ADVERSELY AFFECTED

Political expression in this country is strong and diverse only because the First Amendment has been defended vigorously through the years. From the Sedition Act of 1798 to the civil rights marches of the '60s, to the Nazi march in Skokie, it is obvious that an unrestrained majority can wreak havoc on the political liberties of the minority. It is equally obvious that judicial review, in courts charged with enforcing constitutional rights, is the last and most essential defense against the tyranny of the majority.

CAN's interest in these proceedings is to secure the rights of political dissidents to prompt judicial access - including prompt judicial *disposition* - of permitting decisions affecting political speech. Furthermore, CAN intends to demonstrate that a stay of proceedings to preserve the *status quo* is not a reasonable alternative to judicial review where political rights are at stake. Indeed, a stay is exactly the opposite of the prompt decision-making needed to preserve these fragile liberties.

As recounted above, the experiences of this amicus curiae show in graphic detail why prompt judicial review is absolutely essential to avoid suppression of controversial speech. CAN has repeatedly resorted to litigation in the federal courts to vindicate its First Amendment right to conduct rallies, distribute literature and secure signatures for ballot initiatives.

It is imperative, however, that the Court not reach the false conclusion that access to the federal judiciary is a quick and easy remedy for local violations of First Amendment rights. CAN is an exceptional group in that it has a committed core of activists who are not dissuaded by official intimidation. CAN also has committed attorneys who are willing to litigate these issues on behalf of an indigent client. The lesson to be learned from CAN's experiences is that local suppression of pure political speech is common and often takes the form of permit denials or indefinite delays of permitting decisions.

This Court has long recognized that local government officials cannot be trusted with the final decision to restrain speech:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid prior restraint.

Freedman v. Maryland, 380 U.S. 51, 58, 85 S.Ct. 734, 739 (1965). That principle has been consistently upheld by this Court and has been applied to all manner of permitting and licensing decisions. *See, e.g., FW/PBS, Inc. v. City of*

Dallas, 493 U.S. 215, 110 S.Ct. 596 (1990), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969)).

Despite the clear language of *Freedman* and the public policy mandating judicial intervention, the lower courts have split over the precise form of "judicial review" required. The root of this split among the Circuits appears to be language in the plurality opinion of *FW/PBS* to the effect that mere access to the courts *may* be sufficient for adult business licensing disputes: [4]

> [T]here must be the possibility of prompt judicial review in the event that [a] license is erroneously denied.

FW/PBS, 493 U.S. at 228, 110 S.Ct. 596.

Some courts have found that the possibility of eventual review through common law certiorari or similar judicial actions is sufficient to comply with the *Freedman* requirements.. *See, e.g., Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (*en banc*); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). Other Circuits have insisted that judicial relief is meaningless without an actual determination on the merits within a reasonably brief time. *See, e.g., Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir. 1995) (*en banc*).

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[4] Because this language appears in a plurality decision which did not draw the votes of five members of the Court, it has been argued that *FW/PBS* did not modify the judicial review requirements of *Freedman*. *See, Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir.1998).

At least one Circuit has taken the novel position that "licensing decisions" require less constitutional protection than do "censorship decisions". *See, e.g., Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir 1999).[5]

The purpose of this amicus brief is to urge this Court not to weaken the *Freedman* protections - particularly as applied to noncommercial political speech. As a matter of policy, political speech should be given more protection than commercial speech. Certainly political speech is of greater societal import than adult erotic speech presented for commercial gain. *Compare*, *Barnes v. Glen Theatre*, Inc., 501 U.S. 560, 565-66, 111 S.Ct. 2456, 2460 (1991) (Nude dancing is at "the outer perimeters of the First Amendment, though we view it as only marginally so.") with *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection."). Common sense also tells us that political speech is more sensitive to suppression than is commercial speech.[6]

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[5] CAN respectfully suggests that neither *Freedman*, nor any other decision of this Court, would support a distinction of this nature. Political expression can be curtailed by a supposedly content-neutral permitting scheme just as effectively as by the most blatant censorship scheme. *See, e.g., FW/PBS, supra.*

[6] It would be a sad event in First Amendment jurisprudence if the Constitution were construed to say that core political speech – the very speech for which the First Amendment was added to the Constitution – enjoyed no more protection than sexually explicit, commercially exploited speech.

The policy issues which Appellants address here are precisely the same ones which led to the adoption of the *Freedman* requirements in the first place. There are obvious parallels between the movie publishers at issue in *Freedman* and the political activists who appear here as amicus curiae:

> Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country....

Freedman, 380 U.S. at 59, 85 S.Ct. at 739.

This Court has itself noted the fact that purveyors of commercial pornography have a tremendous incentive to obtain a license for a particular location in a particular community. *FW/PBS*, 493 U.S. at 229-30, 110 S.Ct. at 607. While political activists may be equally motivated to air their views, they do not necessarily have an incentive to conduct their activities in a particular locale. Indeed, an activist facing government opposition in Gainesville, Florida and hampered by limited time and resources, may well conclude that his message will be better received at the next town along the highway.

Furthermore, an adult business can presumably wait a month or two before it secures a license – widespread interest in pornography appears to be a permanent fixture of American culture. In contrast, political issues are often fleeting and may lose their currency in a matter of days. If the organizer of a rally is denied a permit, his speech is effectively censored and suppressed for all time.

These policy considerations are specifically addressed by the plurality in *FW/PBS* when it was faced with an adult business with far greater "staying power" than a movie distributor:

> The Court in *Freedman* also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.

493 U.S. at 229-30, 110 S.Ct. at 607.

Other than the obvious policy considerations favoring the greatest protection for political speech, it should be clear that permitting ordinances restraining rallies and festivals are not simple licensing measures so much as an opportunity to censor speech. For instance, a parade

permit is not a "license" to close streets. Rather, it is a one-time permission to engage in speech which has the prospect of drawing large crowds. There are no continuing licensing standards which the applicant must meet; rather the government considers whether its single use permit will unduly impact on traffic on a particular day. In short, ordinances of the kind routinely applied against these activists bear every mark of a law requiring government permission to speak and no resemblance to regulatory measures of the kind applicable to businesses.

Prompt judicial disposition is imperative to preserve the rights of political activists faced with a prior restraint on speech. Judicial review is no good to the permit applicant if the date for his parade has passed, the election is over, or the particular "hot button" political issue is now cold and stale. Where an adult business may be in a position to "wait out" judicial review or suffer a closure while the case winds its way through the Courts, a political activist must strike while the iron is hot and the slightest delay imposed by administrative authorities is equivalent to the most lasting censorship. The First Amendment demands prompt judicial disposition of permitting decisions affecting pure political speech.

Similarly, a stay of administrative proceedings pending judicial review (the narrow question certified by this Court) does no good for an activist dependent on a permit for his speech. After all, the status quo in that instance is no permit. No permit is equivalent to no speech and no speech spells the end of political discourse. The only remedy which preserves both the rights of the political speaker and the government interest in maintaining order is a prompt administrative decision followed by a prompt judicial determination on the merits.

CONCLUSION

Amicus curiae prays that this Court explicitly preserve the right of prompt judicial review, including a final disposition on the merits, for permitting decisions affecting speech of all kinds. This Court should also recognize that a stay pending judicial review is of no benefit to a speaker who is applying for a permit in the first instance since the status quo effectively censors time-sensitive speech. To the extent this Court may consider a weakening of the *Freedman* standards, this ruling should be expressly limited to commercial licensing decisions affecting adult businesses.

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IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,
Petitioner,

—v.—

CITY OF WAUKESHA, WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF OF MORALITY IN MEDIA, INC. AND NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Morality in Media, Inc. ("MIM") and the National Law Center for Children and Families, as *Amici curiae*, file this brief in support of the Respondent in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

MIM is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

MIM has an interest in this case because it is frequently asked by law enforcement agencies, state legislatures, city councils, and private citizens for advice and guidance on methods to enforce and improve existing laws regulating the distribution of obscenity. MIM recognizes this case to be a major precedent in the area of locating and controlling the effects of sexually oriented businesses at the local level.

More recently MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); and *United States v. Playboy*, ___U.S.___, 120 S.Ct. 1878 (2000).

National Law Center for Children and Families is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court involving First Amendment issues, including: *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (public nudity ordinance); and *United States v. Playboy*, ___U.S.___, 120 S.Ct. 1878 (2000)(cable-porn signal bleed).

NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress* re: CDA), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

Amici are filing this brief in support of the Respondent because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

A city or county licensing ordinance for sexually oriented businesses can only provide the availability of prompt judicial review; it cannot mandate that the review be completed within a certain time. This is so because a city or county council does not have the sovereign power to determine the jurisdiction of state trial courts or those above them and cannot set procedures for those courts that will hear appeals from the local government's administrative decisions. Local legislative bodies have no authority to order a state court to afford any particular degree of promptitude.

Amici argue that prompt access to judicial review by a state court of general jurisdiction is what this Court intended in *FW/PBS, Inc. v. City of Dallas*, *infra.*, by concluding that there be a requirement of "prompt" judicial review from an administrative decision under a municipal ordinance. *Amici* further maintain that it should be sufficient to provide in an ordinance that the sexually oriented businesses can promptly seek review in an appropriate state court. The ordinance would thereby provide an avenue for "prompt" judicial review. The municipalities can provide the "avenue" to seek judicial review, but have no power to require the reviewing courts to dispose of such administrative appeals in an expedited fashion.

However, the superior courts can solve this problem by announcing a rule of procedural due process that is binding on the courts themselves and requires the reviewing judges to dispose of appeals from local administrative decisions in a timely fashion. Such supervision of the administration of justice by the courts protects the rights of all the parties without striking local ordinances or requiring the enactment of new state statutes.

ARGUMENT

I. A Finding that Prompt Judicial "Determination" is Required to Satisfy the *FW/PBS* Procedural Safeguards Mandates an Unnecessary Requirement for Municipalities Since a Licensing Ordinance Can Only Provide for the Availability of Prompt Judicial Review, it Cannot Require that the Review be Completed Within a Certain Time

Cities and Counties can comply with this Court's statement of the need for speedy disposition of municipal or county administration of license applications and enforcement, with the possibility of prompt judicial review of those decisions, as stated in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990), by providing prompt procedural requirements in their ordinances to govern their internal administrative actions. The city and county councils can also provide for prompt access to the judicial review and appeal process available in the superior courts to the license applicant or licensee. The local legislative bodies cannot, however, dictate the speedy resolution time limits within which the reviewing courts dispose of their judicial review of the local government's decisions to grant, deny, suspend, or revoke a license.

In the instant case, the Wisconsin Court of Appeals recognized this dilemma stating: "While a local governing body can pass an ordinance directing judicial review within a short period of time, we doubt that it can also require a court to make a complete and final judicial review on the merits within a specified time period." *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis.2d 93, 115, 604 N.W.2d 870 (Wis. Ct. App. 2000). *See Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000) ("A municipality has no authority to control the period of time in which a state court will adjudicate a matter").

In *Books, Inc. v. Pottawattamie County*, 978 F.Supp. 1247 (S.D. Iowa, 1997) the district court also recognized the dilemma, stating at fn. 7:

> There is no provision, however engineered, that allows a County to force a final determination by its state or federal courts. Such a provision would be beyond a county's power. It is not clear what, if anything, the *FW/PBS* Court meant by concluding the requirement of "prompt judicial review" in a municipal ordinance. This court finds those courts' reasoning which would require a county to attempt the impossible, namely forcing a state or federal court to decide, to be unreasonable and unpersuasive.

Amici maintain that an untenable situation arises if this Court holds that a final determination on the merits is required in order to insure the availability of prompt judicial review of First Amendment considerations. In addition to the inability of municipalities to comply with *FW/PBS* because they cannot order a state court to afford a prompt resolution, this problem is further complicated by the fact that the various States already have in place mechanisms to review administrative determinations that may not provide for any specific degree of promptitude.

To avoid this dilemma, your *Amici* suggest that the language on prompt judicial review by the plurality in *FW/PBS* be found to mean prompt access to judicial review, rather than final judicial determination, as satisfying the requirement for prompt judicial review.

II. The Wisconsin Court of Appeals and the Seventh Circuit are Correct in Their Interpretation that, in the Context of Licensing Ordinances, Prompt Judicial Review Means "Access" to Prompt Judicial Review

The nature of the safeguard, assurance of the availability of prompt judicial review, should not be interpreted to include the rendering of the reviewing court's decision. The essence of the safeguard is the review and not the result. An additional requirement of securing a final determination is unnecessary in the absence of direct prior restraint of speech and misconstrues the purpose of the safeguard.

As Justice O'Connor concluded in *FW/PBS*, 493 U.S. at 228, a licensing ordinance designed to address the secondary effects of sexually oriented businesses need not provide the full procedural safeguards required of a direct censorship law. Such a licensing law does not impose direct censorship of materials and, for that reason, need only provide for prompt access to judicial review and need not guarantee a prompt completion of the judicial review process.

The Wisconsin Court of Appeals in the instant case applied the constitutional framework set forth in *FW/PBS* and correctly held that the ordinance provides for prompt judicial review as stated by the plurality in *FW/PBS*, 493 U.S. at 227-28. The Wisconsin Appeals Court concluded that "the City's ordinance will be upheld as long as expeditious judicial review is available." *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis.2d at 115. The court below found this safeguard to be properly afforded by Sec. 68.13, Wis. Stats., which provides review in the state courts and requires a party to seek that review within thirty days. The Court of Appeals cited several other decisions such as *Graff v. City of Chicago*,

9 F.3d 1309, 1324-25 (7th Cir. 1993), *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993) (finding the *FW/PBS* standards were met where denied applicant could file appeal pursuant to general Massachusetts procedures for informal review of agency decisions), and *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994), in support of its interpretation. Other cases not mandating time limits for a decision include: *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir. 1994) (finding requirement for expeditious judicial review satisfied where unsuccessful licensing applicant can immediately challenge the regulatory decision in court and request a TRO to prevent closing a business), and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). *See also O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990)(declining to apply *FW/PBS* safeguards where it found adult entertainment licensing scheme imposed no restraint and where plaintiff theater was closed because of significant number of acts of public indecency).

In *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994), a news vendor challenged the constitutionality of an Illinois ordinance governing the licensing of city newsstands. Under the statute, within a specified period after denial of a permit, an appeal to the commissioner of transportation could be made. There was no provision concerning the role of the judiciary in reviewing a denial of a permit. The Seventh Circuit, in holding that the procedural safeguards were sufficient despite the lack of any explicit provision authorizing judicial review, found the availability of the state's common law writ of certiorari to provide an aggrieved party with an adequate means of judicial review. *Id.* at 1325.

In *TK's Video Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994), an adult book and video store brought an action

challenging the county's licensing requirements for adult businesses. Under the statute, a rejected license applicant could seek review within thirty days before the order became final. The Court of Appeals for the Fifth Circuit upheld the ordinance's provisions regarding judicial review, stating at 709:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

In *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), the Eleventh Circuit agreed with the First, Fifth, and Seventh Circuits in holding that this Court's requirement of the "possibility of" prompt judicial review is satisfied with access to judicial review. After reviewing the split in the Circuits, the Court concluded at 1256:

> Boss Capital makes a good argument that *Freedman* requires prompt judicial resolution of censorship decisions, but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions. *Freedman* itself unmistakably requires "a prompt judicial decision"...Still, none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead they involved censorship.

Amici assert that it was not the intention in *FW/PBS* to require a prompt judicial decision in situations where municipalities provide for the type of judicial review allowable within its powers. For this Court to hold otherwise

would be to invalidate municipal ordinances solely due to the time frames for that particular locale's judicial review procedures. This could lead to arbitrary and inconsistent decisions by the Circuit Courts because of the different procedures of the various state court systems within their jurisdiction.

In *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998), the City successfully argued that sufficient judicial review is provided by the availability of a proceeding pursuant to Article 78 of New York's Civil Procedure Law. This type of proceeding is a form of action that provides the relief that was previously obtained by writs of *certiorari*, *mandamus* and prohibition. The District Court noted that neither Supreme Court nor Second Circuit case law had addressed whether an action brought pursuant to Article 78 is sufficient to satisfy the requirements noted in *FW/PBS*.

The *Gasparo* Court, in upholding the judicial review procedure as adequate, looked to the Seventh Circuit decision in *Graff v. City of Chicago*, *supra*, finding the statutory schemes to be virtually identical and agreed, stating, 16 F.Supp.2d at 212:

> ... a majority of judges in *Graff* concluded--though for different reasons--that the availability of a *certiorari* action constituted sufficiently prompt judicial review. The five judge plurality in *Graff* held that because an unsuccessful applicant for a permit could obtain judicial review through the common law writ of *certiorari* and could raise his constitutional claims through that mechanism, judicial review was available for the purposes of the First Amendment.

Your *Amici* assert that the Wisconsin Court of Appeals, along with the First, Fifth, Seventh, and Eleventh

Circuits, are correct in holding that the appropriate standard to be applied, with respect to judicial review of license denials in this area, is that of access to prompt judicial review, not the additional requirement of a prompt judicial decision. The dangers of a censorship scheme do dictate that a prompt decision be had as established by the *Freedman* Court. *Freedman v. Maryland*, 380 U.S. 51 (1965). Unlike censors, who pass judgment on the content of expression, licensing officials look at technical and ministerial facts in deciding whether to issue a license. *See FW/PBS*, 493 U.S. at 229. Thus, licensing decisions are different and *Amici* agree with *Boss Capitol* where the Court states: "We believe this is a situation for 'treating unlike things differently according to their differences.'" *Id.* at 1256.

III. There is a Distinction Between Censorship Schemes Which Involve Decisions Based on the Content of Expression and Applicant Licensing Which Involves Substantial Government Interests

Amici agree with the Wisconsin Court of Appeals in *City News & Novelty*, 231 Wis.2d at 113:

> While the *Freedman* Court apparently contemplated timely issuance of a "decision" or "determination," more recently in *FW/PBS* the Court appears to have relaxed this requirement by emphasizing the "possibility" and "availability" of prompt judicial review.

In *FW/PBS* the Court justified the more narrowly defined scope of procedural safeguards because the dangers of the censorship system were not present in the licensing scheme. Justice O'Connor explained that a licensing scheme does not require individuals to judge the content of the

speech. Instead, "the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." 493 U.S. at 229. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 641 (4th Cir. 1999) ("...permitting schemes like Raleigh's do not directly regulate content...They are a far cry from the censorship scheme present in *Freedman.*") *See also Ward v. County of Orange*, 217 F.3d 1350, 1355, (11th Cir. 2000) ("Once again, it is important to stress the differences between censorship schemes and licensing schemes--'the dangers of censorship are less threatening when it comes to licensing schemes.'")

Where a licensing scheme regulates speech and non-speech elements, full procedural protections are not warranted. This Court has allowed state governments greater latitude in regulating "speech plus conduct" than in regulating "pure speech." *United States v. O'Brien*, 391 U.S. 367, 376 (1968), *quoted in FW/PBS*, 493 U.S. at 244. A sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.

Amici maintain that there is a distinction between censorship schemes that involve decisions based on the content of expression and applicant licensing which involves substantial government interests, such as preserving the public welfare and preventing violations of public health and safety regulations. These substantial interests include: monitoring of businesses for violations of building codes; zoning and interior configuration requirements; monitoring employees for criminal sexual offenses; protecting minors from employment in sexually oriented businesses; prevention of infiltration of control by organized crime; and preventing recidivism by those convicted of sex-related crimes. *See Schultz v. City of Cumberland*, ___ F.3d ___, No. 98-4126 (7th Cir. Sept. 26, 2000), 2000 WL 1389619 (A city

government could require municipal licensing for adult bookstores based on a secondary-effects rationale. The Court upheld inspection requirements, certain portions requiring applicant disclosures, interior-configuration requirements and enabled the City to enforce compliance with the special health and safety requirements for sexually oriented businesses.)

In holding that prompt judicial review means prompt "access" to judicial review, the First, Fifth, Seventh and Eleventh Circuits have given implicit recognition to the application of secondary effects analysis in the context of licensing. By allowing municipalities to license sexually oriented businesses based on the general qualifications of an applicant, these courts recognize that local governments have a substantial interest in preventing crime and urban blight through the use of licensing laws. *See Boss Capital v City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999) ("Licensing officials do not pass judgment 'on the content of any protected speech'; rather, they look at 'the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.'")

The additional requirement of securing a prompt judicial decision is not imposed by *FW/PBS* and is unnecessary in the absence of direct prior restraint of speech. The distinction between censorship and applicant licensing requires municipalities to provide only access to prompt judicial review.

IV. If This Court Concludes that Prompt Judicial Review Mandates A Final Decision, *Amici* Urge this Court to Announce a Rule of Procedural Due Process to Instruct the Lower Courts How to Hear and Dispose of These Appeals or Judicial Reviews in a Prompt and Expedited Manner

As noted earlier, if this Court determines that a prompt judicial decision is required in order to satisfy the procedural safeguards for licensing sexually oriented businesses, this interpretation will pose great problems for municipalities. *See Nightclubs, Inc. v. City of Paducah, supra*. It would be an unwise exercise of the supervisory powers of the court to announce a judicially imposed rule of procedure that cannot be accommodated by municipalities. The procedural rule should be directed to the court hearing the judicial review, without striking the ordinance on its face.

In the event this Court determines that a specific time period is required, your *Amici* urge this Court to instruct states and cities how they might comply.

The most effective and least burdensome proposition would be for this Court to implement a rule of procedural due process that would require state courts to render a speedy ruling within a time period this Court determines to be a reasonable time. This would significantly aid municipalities and relieve them of the onerous burden of having to forgo enacting and enforcing local regulations until a state legislature either amends an existing statute or adopts a new one. This method of construing a statute to provide procedural due process was adopted by this Court in providing a time limitation for obscenity cases under the Customs forfeiture statute. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), this Court held:

> Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seen undue for importers engaged in the lengthy process of bringing

goods into this country from abroad. Accordingly, we construe Sec. 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court.

This rule of judicial administration was followed in *Gasparo*, 16 F.Supp.2d at 210.

As a matter of constitutional law, this Court could instruct the state courts that they must provide an assurance of procedural due process by hearing and disposing of these appeals or judicial reviews in a prompt and expedited manner. This Court could impose specific time limits such as sixty, ninety, or 120 days, if necessary, in order to guide the lower state courts. *Id.* at 373-74.

Amici assert that, as with the *Miranda* warnings, no state statute was required to impose the rule of *Miranda* which dictated that the police must read the *Miranda* rights to an arrested defendant. *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, every state and federal court knew on and after the *Miranda* decision that the failure to read a defendant his rights would require those courts to suppress evidence or confessions or otherwise provide an exclusionary rule in order to provide the procedural due process afforded under the Fifth Amendment.

Also, in the First Amendment area, this Court imposed a warrant requirement that is not necessary in other Fourth Amendment situations. That rule is self-executing and every state and federal court and law enforcement official knows by reading this Court's decisions what is required of them to provide such procedural due process. *Roaden v. Kentucky*, 413 U.S. 496 (1973), and *Heller v. New York*, 413 U.S. 483 (1973). *See also New York v. P.J. Video, Inc.*, 475

U.S. 868 (1986). But see, when the procedures are not properly followed, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

A court's duty to insure proper procedural due process is a matter of the administration of justice and the supervision of the courts, and need not involve the imposition of statutory procedures by the state legislatures nor the Congress. Although the State could impose specific time limits and procedural mandates by statute or by codification of procedural court rules, nothing in the Constitution nor the decisions of this Court requires them to do so. Some states have elected to do so in light of the federal decisions holding municipal ordinances or state statues unconstitutional. *See Baby Tam v. City of Las Vegas*, 199 F.3d 1111, (9th Cir. 2000) (The State amended the Nevada Revised Statutes and the local court's rules of practice to allow for prompt judicial review of claims of prior restraint). *See also, Cal. Code of Civ. P.* Sec. 1094.8 requiring a prompt judicial decision in cases alleging prior restraint of speech or expressive conduct, and *Tenn. Code Ann.* Sect. 7-51-1110(d) providing for prompt review. However, if the federal courts had merely declared the need for judicial promptness in rendering a decision as a matter of procedural due process, then the state courts could have authoritatively construed existing statutes and provided adequate procedural due process, without infringing on the rights of the states to administer their laws and without having had the federal courts enjoin or otherwise declare those state laws facially unconstitutional.

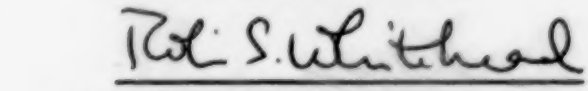
Without the Court's instruction as to the meaning of a prompt judicial determination, if that is what is held is to be required, questions will remain concerning the extent to which a judicial process must be completed before the time period becomes unreasonable. For instance, would "determination" require that an ordinance provide for completion of review at both the trial and appellate levels, or

is an initial judicial determination sufficient? Likewise, is it sufficient that there is the availability of the right to ask the reviewing court for a temporary restraining order to provide a judicial means of insuring the lack of restraint pending review or appeal? As the Fifth Circuit noted in *TK's Video*, to require that "all judicial avenues be exhausted would be an oxymoron" 24 F.3d at 709, and may be inconsistent with *Freedman*, 380 U.S. at 60, that review be provided in a manner "compatible with sound judicial resolution." Any announcement of a rule of procedural due process should be directed at the courts, without the need to strike city or county ordinances or enact new state statutes.

CONCLUSION

For all of the above reasons, your *Amici* pray that this Honorable Court affirm the judgment of the court below and declare the City of Waukesha's licensing ordinance constitutional in that it properly provides for access to prompt judicial review as required by this Court in *FW/PBS*.

Respectfully submitted,



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No. 99-1680

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT II

BRIEF FOR STATES OF ALABAMA, COLORADO, NEBRASKA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR STATES OF ALABAMA, COLORADO, NEBRASKA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The respondent, City of Waukesha, Wisconsin, has adopted by ordinance the municipal administrative review procedure established by state law. *See* Waukesha, Wis., Municipal Code § 8.195(11) (1995), adopting Wis. Stat. ch. 68. The petitioner, City News and Novelty, Inc., contends that this statutory procedure is unconstitutional as applied to the review of municipal licensing decisions

affecting businesses which engage in activity protected by the First Amendment.

The Attorney General of Wisconsin is obligated to defend the statutes of the State of Wisconsin in any court in which their validity may be challenged. *See* Wis. Stat. §§ 165.25(1) and 806.04(11). And when addressing the constitutionality of a statute of statewide application where the party defending the statute is someone other than the attorney general, this Court considers the views of the state's chief law enforcement officer highly relevant. *See New York v. Uplinger*, 467 U.S. 246, 247 n.1 (1984).

Wisconsin and the other states are also interested in supporting the legitimate efforts of their constituent municipalities to control the deleterious secondary effects of businesses which sell sexually explicit material within their boundaries and the boundaries of the states. Thus, the states support the respondent, City of Waukesha.

SUMMARY OF ARGUMENT

To determine the procedures which must be followed when a government entity seeks to terminate a right or privilege it has previously granted, the Supreme Court has evolved a test which balances three factors: (1) the nature and weight of the private interest affected, (2) the risk of an erroneous deprivation of this interest using existing procedures compared with alternative or additional procedures and (3) the government's concern with both the interest involved and the procedures used to regulate it. The factors considered in this test may appropriately be applied in determining what procedures are constitutionally required to review the refusal of a municipality to renew the license of a business which engages in expression protected by the First Amendment.

Not all expression is protected equally by the First Amendment. Sexually explicit material is afforded less protection than political debate. Commercial speech also occupies a lower position on the scale of constitutional values. Thus, the petitioner's interest in selling sexually explicit material rests at the lower end of the spectrum of protection provided by the First Amendment because of its relatively negligible value to society.

There is not much risk of an erroneous deprivation of this limited interest under existing procedures, first of all because the decision to grant or deny the renewal of a license is essentially a ministerial duty of the city clerk based exclusively on determinations of empirical fact, in particular whether the applicant has violated the regulatory provisions of the ordinance. There is less risk of error in making a relatively simple retrospective determination of fact than in attempting to shape the more complex and often subjective evaluations involved in assessing the worthiness of either an expressive work or the person who wants to exhibit it as in other cases which have come before this and other federal courts.

The codified administrative review procedure minimizes the risk that any initially erroneous decision will remain uncorrected for long. An applicant whose license is not renewed by the city clerk can obtain prompt independent review by the Administrative Review Appeals Board ("Board").

The Board must promptly hold an adversary hearing at which the applicant can present the sworn testimony of witnesses and cross-examine the witnesses presented by the municipality with the assistance of an attorney. Since the expression engaged in by the applicant plays no role in the licensing decision, there is no need for any special sensitivity to freedom of expression, as in censorship cases, and thus no need for a judge to conduct the adversary review proceeding.

A final decision must be made within twenty days of the commencement of the hearing. Thus, the entire relicensing process can be completed before the license expires, thereby automatically maintaining the status quo throughout the administrative process.

Considering the nature of the simple factual decision to grant or deny the renewal of a license, and the availability of prompt comprehensive independent administrative review of the initial decision, there is little remaining risk that the final decision which emerges from this administrative process will be erroneous.

The Wisconsin procedure provides that a disappointed applicant may initiate judicial review of a final administrative decision. Since there has already been a factual determination that the licensee violated content-neutral time, place and manner regulations regarding the operation of its business, there is no reason why the government should have the burden of going to court to prove its case all over again. Instead, as in other similar situations, the burden should be on the party found guilty of wrongdoing to initiate the process by which it seeks to overturn that finding.

Moreover, a judicial decision on review of the review of the initial decision to refuse to renew a license will be of little assistance in reducing the already minimal risk of error even more. Since the licensing decision is essentially factual, the review conducted by the court will necessarily be limited to the question of whether any rational trier of fact could have made it. Because the value of this review as yet another layer of risk-reducing procedure is limited, there is little reason to impose fixed time limits within which the court must make a decision.

Similarly, because the risk of error following administrative review is low, and because judicial reversal of the final administrative decision will be infrequent, there is

no reason to automatically allow businesses to continue to operate in all cases after the final administrative decision as part of the legislatively prescribed process of review. Instead, in those rare instances where it appears that the administrative process might have made a mistake, the rights of a business whose license has not been renewed may be fully protected pending judicial review by its ability to ask the reviewing court for a temporary injunction to maintain the status quo.

In addition, any error in refusing to renew the license of a business which sells sexually explicit material or to permit the business to continue to operate pending judicial review of the licensing decision can be compensated by paying the proprietor money damages for any lost profits, at least when the refusal to renew the license was premised on a purpose to prevent the licensee from exercising protected rights.

The city and the state share an important interest in combating the adverse secondary effects of a business which sells sexually explicit material. Both units of government also have a legitimate interest in the efficient administration of justice including the right of a court to control its own calendar.

Balancing these governmental interests against the lesser protection afforded to the private interest in selling sexually explicit material, the efficacy of existing administrative review procedures in reducing the risk of error in a decision refusing to renew the license of a business which sells sexually explicit material and the limited benefit which might be provided by additional requirements for the judicial review of the administrative decision, it is sufficient if the licensing scheme provides for prompt access to the courts rather than a prompt judicial decision and if a judicial procedure such as an injunction is available to maintain the status quo in appropriate cases after the business has sought review.

ARGUMENT

WHEN A GOVERNMENTAL LICENSING SCHEME PROVIDES COMPREHENSIVE ADMINISTRATIVE PROCEDURES WHICH MINIMIZE THE RISK OF AN ERRONEOUS REFUSAL TO RENEW THE LICENSE OF A BUSINESS THAT SELLS SEXUALLY EXPLICIT MATERIAL, IT IS SUFFICIENT TO PROVIDE FOR PROMPT ACCESS TO THE COURTS RATHER THAN A QUICK JUDICIAL DECISION, AS LONG AS A JUDICIALLY ISSUED INJUNCTION IS AVAILABLE TO MAINTAIN THE STATUS QUO WHILE THE BUSINESS PURSUES FURTHER REVIEW.

In this case, the Court has been asked to determine what procedures are constitutionally required to review the refusal of a municipality to renew the license of a business which engages in expression protected by the First Amendment.[1]

This is not the first time the Court has had the task of determining the procedures which must be followed when a

[1]Ordinarily, a federal court should not anticipate a question of constitutional law before the need to decide it arises, and should accordingly refrain from formulating any rule of constitutional law which is broader than required to decide the question presented by the facts in the case where it must be applied. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Even in First Amendment cases where the overbreadth doctrine might otherwise be apt, the court should limit its inquiry when the party challenging a statute engages in expression which the statute purports to proscribe, thus assuaging any concern that protected speech will be discouraged for want of a proper party to question the effect of the law. *See id.* at 502-04.

government entity sought to terminate some right or privilege it had previously granted. In a series of cases, rather, the Court has specified the procedures required in a variety of analogous situations. *See, e.g., Gilbert v. Homar*, 520 U.S. 924 (1997) (suspension of public employment); *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230 (1988) (suspension of bank officer); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of public employment); *Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of driver's license); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (termination of social security benefits); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits).

To determine what process is constitutionally due in any particular situation the Court has evolved a test which balances three factors: (1) the nature and weight of the private interest affected, (2) the risk of an erroneous deprivation of this interest using existing procedures compared with alternative or additional procedures and (3) the government's concern with both the interest involved and the procedures used to regulate it. *See, e.g., Gilbert*, 520 U.S. at 931-32; *Mackey*, 443 U.S. at 10-11; *Mathews*, 424 U.S. at 335.

This test has usually been used in cases involving interests protected generically under the Due Process Clause. But the factors it considers are just as relevant and helpful when the interest limited by the procedure in question is protected more specifically by the First Amendment. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 334-35 (1985). *See also 11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 997 (4th Cir. 1995) (en banc) (time during which prior restraint on speech may continue to operate may vary in different contexts

requiring examination of type of judgments to be made by government and hardship placed on applicant by restraint). The nature of a claim regarding the adequacy of particular procedures to prevent an erroneous deprivation of rights is the same regardless of the right at stake. Only the specific considerations to be weighed on the scales are different. And applying an established formula in resolving the constitutional question could help channel the Court's reasoning and perhaps resolve the proliferation of views which emerged in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

A. The Petitioner's Interest In Selling Sexually Explicit Material Lies At the Lower End Of The Spectrum Of First Amendment Protection.

The petitioner, City News and Novelty, Inc., which is in the business of selling sexually explicit material, undoubtedly engages in expression protected by the First Amendment. *See FW/PBS, Inc.*, 493 U.S. at 224. But the First Amendment is not absolute. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *Miller v. California*, 413 U.S. 15, 23 (1973). And not all expression is protected equally because not all expression is equally important.

Society's interest in protecting erotic materials which have some arguably artistic value, thereby lifting them above the level of otherwise unprotected obscenity, *see generally Miller*, 413 U.S. at 23-25, "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976). *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) (bar room nude dancing involves only barest minimum of protected expression); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (speech on public issues occupies highest rung on hierarchy of First Amendment values).

Moreover, the selling of expression imbues it with a commercial character. *See Breard v. City of Alexandria, La.*, 341 U.S. 622, 642 (1951). And although speech which is sold for profit is still afforded some protection, it too is less than the protection given ideological communication, commensurate with the subordinate position of commercial speech on the scale of constitutional values. *See Florida Bar*, 515 U.S. at 623; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Thus, the private interest in selling sexually explicit material at stake in this case lies at the lower end of the spectrum of protection provided by the First Amendment because of its relatively negligible value to society.

The Court did not consider the diminished importance of the interest in profiting from erotic representations in trying to decide in *FW/PBS, Inc.*, whether all the procedural protections required by *Freedman v. State of Maryland*, 380 U.S. 51 (1965), to validate a scheme for imposing prior restraints on the exhibition of films were also necessary in a scheme which licensed adult businesses. Instead, it appeared to elevate this limited interest to unmerited parity with speech which involves the exposition of ideas. *See FW/PBS, Inc.*, 493 U.S. at 226 (plurality opinion of O'Connor, J.); *id.* at 239-40 (Brennan, J., concurring).

Now, however, the Court should consider that the interest at stake here is not as important as other interests protected by the First Amendment in determining what procedures are necessary to reduce the risk of an erroneous deprivation of that interest.

B. The Risk Of An Erroneous Deprivation Of The Interest In Selling Sexually Explicit Material, Which Is Already Minimal Under Existing Procedures, Would Not Be Significantly Diminished Further By Additional Requirements.

1. The initial decision whether to renew a license is based on a determination of empirical fact rather than any value judgment regarding either the quality of the material sold or the qualifications of the seller.

There is not much risk of an erroneous deprivation of the interest in selling sexually explicit material under existing procedures, first of all because of the nature of the decision which must be made to determine whether the license of an adult entertainment business will be renewed.

Under the Waukesha adult establishments ordinance, the standards for the original issuance of a license also apply to an application for renewal. *See City News and Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 107, 604 N.W.2d 870, 876 (Ct. App. 1999). Applicants are entitled to renewal of a license if they are at least eighteen years of age, if they provide all the information relevant to their application, and if they have not been found liable for violating any of the regulatory provisions of the ordinance within the preceding five years. *See* Waukesha, Wis., Municipal Code § 8.195(3)(e) and (4) (1995).

Thus, whether to grant or deny a renewal is essentially a ministerial duty based exclusively on determinations of empirical facts, many if not most of which will have already been determined in previous judicial proceedings brought on charges of violating the ordinance. The city clerk, who initially decides whether a license is renewed, *see* Waukesha

Municipal Code § 8.195(3)(a), does not exercise any discretion to make any value judgements about either the quality of the material, as in *Freedman*, or the qualifications of the licensee, as in *FW/PBS, Inc.*

Nor is the clerk required to decide complicated constitutional questions. Any complaints about the constitutionality of either the substantive or procedural features of the applicable ordinances or statutes may be raised by immediately commencing a declaratory judgment action in the courts without the necessity of exhausting ineffective administrative remedies first. *See State ex rel. 1st Nat'l Bank v. M&I Peoples Bank*, 82 Wis. 2d 529, 544-46, 263 N.W.2d 196, 203-04 (1978). Alternatively, constitutional attacks on either the enactments themselves or the way they are applied in a particular case may be made later on judicial review of an administrative decision. *See id.*

There is less risk of error in making no more than a relatively simple retrospective determination of whether an event has in fact occurred than in attempting to shape the more complex and often subjective evaluations involved in assessing the worthiness of either an expressive work or the person who wants to exhibit it. *See Mackey*, 443 U.S. at 13-14. *Cf. Morrissey*, 408 U.S. at 479-80 (contrasting factual and judgmental decisions in parole revocation process). There is also less threat of censorship. *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000).

2. The applicable administrative review procedure minimizes the risk that any initially erroneous decision will remain uncorrected for long.

The City of Waukesha adult establishments ordinance in partnership with the State of Wisconsin municipal administrative procedure code provide administrative procedures which minimize the risk that any initially erroneous decision will remain uncorrected for long.

To begin with, the city clerk must notify the applicant whether a license has been renewed within twenty-one days. *See* Waukesha Municipal Code § 8.195(3)(c). If the license is not renewed, the applicant may request a public hearing, which must be held within ten days. *See* Waukesha Municipal Code § 8.195(3)(d) (as amended Sept. 20, 2000). Thus, there is not only a prompt decision on the reissuance of a license, but an opportunity for prompt review of that decision.

The hearing must be in conformity with the provisions of Wis. Stat. § 68.11(2) and (3). *See* Waukesha Municipal Code § 8.195(3)(d). Thus, the review must be conducted by an impartial decision-maker who was not involved in the initial decision. *See* Wis. Stat. § 68.11(2). Waukesha has created an Administrative Review Appeals Board to perform this function. *See City News and Novelty, Inc.*, 231 Wis. 2d at 102, 604 N.W.2d at 876. The Board must conduct an adversary hearing at which the applicant can present the sworn testimony of witnesses and cross-examine witnesses presented by the municipality with the assistance of an attorney. *See* Wis. Stat. § 68.11(2).

In *Freedman*, this Court said that the adversary proceeding had to be conducted by a judge. *See id.*, 380 U.S. at 58. But *Freedman* was a censorship case. So a judicial determination was required to insure the "sensitivity to

freedom of expression" necessary when the determination of whether a film could be shown was based on the content of the material. *See id.*

This is a licensing case. There is no attempt to prevent anyone from selling any particular material, and the content of the material sold is otherwise irrelevant in determining whether a license will be renewed. The only question is whether the licensee has violated the regulatory provisions of the ordinance. Since the expression engaged in by the licensee plays no role in the licensing decision, there is no need for any special "sensitivity to freedom of expression" in the independent review of the decision whether to renew a license. As in other administrative review procedures, therefore, there is no need for a judge to conduct the adversary proceeding which accomplishes that review. *See Morrissey*, 408 U.S. at 486 and 489.

This *de novo* evidentiary hearing, which offers not only independent review but independent collegial review, presents an unlimited opportunity to identify and correct any error which might have been made in the initial license renewal decision, including any error in previous convictions for violating the ordinance. The licensee may relitigate both the question of whether a violation occurred and whether any violation committed by an employee should be attributed to the licensee.

A final decision must be made within twenty days of the commencement of the hearing. *See* Waukesha Municipal Code § 8.195(3)(d). This means that the entire relicensing process can be completed in a total of fifty-one days. And since the application for renewal must be made at least sixty days before the license expires, *see* Waukesha Municipal Code § 8.195(7)(a), a licensee whose application for renewal is denied can have a final administrative determination before the license expires, thereby automatically maintaining the status quo throughout the administrative review process.

This case is different from both *Freedman* and *FW/PBS, Inc.*, therefore, not only because of the significant difference in the nature of the initial licensing decision, but also because of the availability of effective administrative procedures to promptly review that decision which were not offered in either the Maryland or Dallas licensing schemes. Considering the nature of the simple factual decision to grant or deny the renewal of a license and the availability of prompt comprehensive independent administrative review of the initial decision, there is little remaining risk that the final decision which emerges from this administrative process will be erroneous.

3. Because it is unlikely that judicial review of the final administrative decision will uncover additional error that has not already been corrected, there is no reason to require a prompt judicial decision.

The Wisconsin procedure allows a disappointed applicant to initiate judicial review of a final administrative decision by certiorari, *see* Wis. Stat. § 68.13, which is a constitutionally sufficient means of reviewing licensing decisions implicating protected speech. *See Graff v. City of Chicago*, 9 F.3d 1309, 1325 (7th Cir. 1993) (en banc), *cert. denied*, 511 U.S. 1085 (1994).

In *Freedman*, the Court required the government to go to court to prove that a particular film was subject to censorship. *See id.*, 380 U.S. at 58. But censorship is not involved here. The issue is whether the licensee has violated content-neutral time, place and manner regulations regarding the operation of its business. And by the time the judicial review proceedings are commenced, there will already have been a factual determination in an adversary proceeding, perhaps in a prior judicial proceeding, that there was a violation.

There is no reason why the government should be required to go to court to prove again that the evidence it presented at the adversary hearing was sufficient to prove that the licensee was liable for violating the ordinance. Instead, the burden should be on the licensee as in every other case where a party found guilty of wrongdoing seeks to contest the sufficiency of the evidence to prove guilt. *See generally Martinez v. Court of Appeal of California*, 120 S. Ct. 684, 691 (2000) (defendant initiates appellate process seeking to overturn finding of guilt).

Moreover, a judicial decision on review of the review of the initial decision to refuse to renew a license will be of little additional assistance in reducing the minimal risk of error even further. Since the decision is essentially factual, the review conducted by the court will necessarily be constrained. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-75 (1985). Indeed, even when reviewing a claim that a litigant was engaged in protected speech, which is not in issue under the Waukesha licensing scheme, a court must defer to the findings of the trier of fact in making an independent assessment of the constitutional question. *See Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 567 (1995).

It is the responsibility of the trier of fact to resolve conflicts in the evidence, weigh the evidence and draw reasonable inferences from it. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court, therefore, cannot assess the credibility of the witnesses or weigh the evidence in reviewing the sufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 16 (1978). And if the historical facts support conflicting inferences, the court must defer to the factfinder's choice. *See Jackson*, 443 U.S. at 326.

The question for the court is simply whether any rational trier of fact could have made the decision under review. *See id.* at 319 and 324. So if there is a plausible account of the evidence which supports the conclusion of the trier of fact, a reviewing court may not reverse even though as factfinder it would have viewed the evidence differently and reached a different conclusion. *See Anderson*, 470 U.S. at 573-74.

Judicial review, therefore, cannot correct any possible errors made by the factfinder in determining credibility, weighing the evidence or drawing inferences from the evidence. It can correct only the most obvious errors in concluding that the evidence found to be credible, the evidence given weight and the inferences drawn from that evidence are sufficient to establish the factual proposition that the applicant violated the regulatory provisions of the ordinance. But it is those obvious errors in reaching the ultimate conclusion that the previous administrative review process is most likely to self-correct.

Because judicial review of a factual administrative decision is unlikely to uncover additional reversible error which has not already been corrected, its value as yet another layer of risk-reducing procedure is limited and there is little reason to impose fixed time limits within which a court must complete its review and make a decision which will not have much effect in further protecting the rights of the applicant. *Cf. Boss Capital, Inc.*, 187 F.3d at 1256 (need for prompt judicial decision less compelling for licensing decision than for censorship).

4. The rights of a business which engages in protected expression are fully protected by the availability of a judicially issued injunction to maintain the status quo during the duration of the review process.

In a situation involving the renewal of a license of an existing business, the rights of the business are fully protected if the status quo is maintained and it is permitted to continue to operate while the court reviews the adverse administrative decision. *See 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1114 (9th Cir. 1999). As long as the status quo is maintained, the review process can continue indefinitely without risking the suppression of protected expression. *See id.*

But because the risk of error following administrative review is low under the Waukesha scheme, and because judicial reversal of the final administrative decision will be infrequent, there is no reason to automatically allow businesses to continue to operate in all cases after the final administrative decision as part of the legislatively prescribed process of review.

Instead, in those rare instances where it appears that the administrative process might have made a mistake, the rights of a business whose license has not been renewed may be fully protected pending judicial review by its ability to ask the reviewing court for a temporary injunction to maintain the status quo pending disposition of the proceeding. *See* Wis. Stat. §§ 781.02 and 813.02(1). Under Wisconsin law, it is a virtually imperative duty of the court to issue an injunction when there is a reasonable probability of success on the merits and disturbance of the status quo pending the resolution of the dispute would cause serious and irreparable injury to the complaining party. *See Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377, 381 (1964).

Both *Freedman* and *FW/PBS, Inc.* involved decisions whether to issue a first permit to begin disseminating protected material so that, unlike the present case, maintaining an existing situation in which the petitioners were permitted to continue to disseminate material as they had in the past was not a viable option in safeguarding their constitutional rights.

Besides, since businesses regulated by the Waukesha adult establishments ordinance are concerned with selling sexually explicit material rather than advocating ideas, any error in refusing to renew a license or to permit the business to continue to sell its wares pending judicial review of the licensing decision can be compensated by paying the proprietor money damages for any profits lost during the period the business was erroneously closed, at least when the refusal to renew the license was premised on a corrupt or malicious motive such to prevent the licensee from exercising protected rights. *See Allstate Ins. Co. v. Metropolitan Sewerage Comm.*, 80 Wis. 2d 10, 17-18, 258 N.W.2d 148, 151 (1977).

Thus, the very nature of the limited private interest involved in this case makes it unnecessary to insist on either a prompt judicial decision or automatic maintenance of the status quo pending that decision to insure that the real interest will not be lost by a deliberately discriminatory decision which may not be corrected administratively. It is money not expression which may be lost. And money can be repaid.

C. The Government Has Substantial Interests In Controlling The Deleterious Secondary Effects Of Businesses Which Sell Sexually Explicit Material, And In The Efficient Operation Of The Judicial System.

The purpose of the City of Waukesha in enacting its adult establishments ordinance was not to control the content of any communication engaged in by businesses selling sexually explicit material, but only to combat the adverse secondary effects of such businesses, including a rise in crime and a degradation of the quality of the neighborhoods where they are located. *See* Waukesha Municipal Code § 8.195, Introduction. Especially where the renewal of a license is concerned, Waukesha has no interest in prior restraint of protected expression by insisting on approving it before it can be enjoyed. *See generally Near v. State of Minnesota*, 283 U.S. 697, 713 (1931) (defining prior restraint). Instead, the city wants to prevent the repetition of past conduct which has contributed to the secondary effects with which it is concerned, such as permitting minors to loiter and patrons to engage in sex on the premises. *See City News and Novelty*, 231 Wis. 2d at 101-02, 604 N.W.2d at 826.

This is a substantial governmental interest, shared by the State of Wisconsin, which should be accorded respect in assessing the constitutionality of a law which imposes only content-neutral time, place and manner regulations on the conduct of the business. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-50 (1986).

Furthermore, the state and its municipalities have a legitimate interest in the efficient administration of justice. *See Martinez*, 120 S. Ct. at 692. This interest surely includes the right of the courts to control their own calendars so that the justice they dispense is not only swift but also sure. *See generally Mallen*, 486 U.S. at 244 (public interest in correct

judicial decision counsels against constitutional imperative that might require overly hasty decision making).

Balancing these governmental interests against the lesser protection afforded to the private interest in selling sexually explicit material, the efficacy of existing administrative review procedures in reducing the risk of error in a decision refusing to renew the license of a business which sells sexually explicit materials and the limited benefit which might be provided by additional requirements for the judicial review of the administrative decision, it is sufficient if the licensing scheme provides for prompt access to the courts rather than a prompt judicial decision and if a judicial procedure such as an injunction is available to maintain the status quo in appropriate cases after the business has sought review.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals of Wisconsin, District II, upholding the constitutionality of the licensing scheme embodied in Waukesha, Wis., Municipal Code § 8.195 and Wis. Stat. ch. 68 should be affirmed.

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IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC,
Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,
Respondent.

On Writ of Certiorari to the Court of Appeals of Wisconsin

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a municipal licensing scheme for sexually oriented businesses is invalid under the First Amendment if it does not require a prompt judicial decision when a business owner challenges the denial of a license.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] They have a compelling interest in the issue presented in this case: whether a municipal ordinance that requires the licensing of sexually oriented businesses is invalid if it does not assure that judicial challenges to the application of the ordinance will be resolved promptly.

This case has tremendous practical importance for States and local governments across the Nation. As the Court has noted on a number of occasions, local governments have found the effective regulation of adult businesses to be essential for the prevention of crime, the preservation of property values, and the maintenance of neighborhood quality. See, *e.g.*, *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). To accomplish these purposes, States and innumerable municipalities have adopted licensing regulations similar to the Waukesha ordinance challenged in this case. If petitioner prevails in its argument that prompt judicial resolution of challenges to the application of such regulations must be assured—a guarantee that it is beyond the power of local gov-

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

ernments to provide—these regulations will be rendered invalid, substantially undercutting the ability of States, counties and municipalities to combat the corrosive secondary effects of sexually oriented businesses. Because *amici* have substantial experience with the sort of ordinance at issue here and will be directly affected by the Court's decision, they submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

Petitioner's argument that a scheme for the licensing of adult businesses must guarantee a prompt judicial decision when a business contests the denial of a license is flawed on several levels. *Freedman* v. *Maryland*, 380 U.S. 51 (1965), held that such judicial promptness is required when the State imposes a system of censorship, where the censor also bears the burden of seeking court approval for the suppression of speech, and where any restraint imposed in advance of a judicial decision must be temporary. In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), however, the lead opinion took a different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue, appearing to indicate that it is sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license. This departure from *Freedman* is only logical. The Court held in *FW/PBS* that the administrators of licensing schemes for adult businesses (unlike the censors in a case like *Freedman)* do *not* bear the burden of seeking court approval for license denials—and it was the requirement that the censor obtain advance judicial authorization for the suppression of speech that was the essential predicate for *Freedman*'s further insistence on the prompt completion of judicial review.

More fundamental First Amendment principles confirm that prompt resolution of judicial challenges to the denial of licenses for sexually oriented businesses is not necessary. Such a promptness requirement makes sense when the regulation of speech is presumptively unconstitutional because it involves censorship of content or unconstrained administrative discretion. But regulations of adult businesses do not require an assessment of the content of speech, and give local officials very limited discretion. As a consequence, such licensing regimes do not allow for the suppression of particular ideas. At the same time, the proprietors of adult businesses have a substantial economic stake in seeing the judicial review process through to completion, a reality that reduces the need for an immediate judicial resolution. In these circumstances, the availability of a temporary restraining order or preliminary injunction to prevent abusive uses of the licensing process suffices to protect the interest in free expression.

Indeed, we believe that challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*. It is appropriate to treat a regulation of speech as a prior restraint when it may be applied to suppress particular points of view. In contrast, regulations that serve purposes unrelated to the content of expression are deemed content neutral, even if they have an incidental effect on some speakers but not others. That analysis should govern licensing requirements of sexually oriented businesses. Such regulations, which are directed at the secondary, non-expressive effects of adult businesses, are justified without reference to the content of the regulated speech. That sort of restriction is properly analyzed as a time, place, and manner regulation rather than as a prior restraint.

See City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE THE PROMPT RESOLUTION OF CHALLENGES TO THE APPLICATION OF A MUNICIPAL ORDINANCE REQUIRING THE LICENSING OF SEXUALLY ORIENTED BUSINESSES

At the outset, two points may help put the issue here in perspective. *First*, as respondent explains, much of petitioner's brief is directed at a point that is not properly in the case. Petitioner argues at considerable length that Waukesha's *administrative* licensing process is defective. See Pet. Br. 19-27. The Court, however, limited its grant of certiorari to the question whether a licensing scheme is unconstitutional if it does not "contain explicit language which prevents injury to a speaker's rights from want of a prompt *judicial* decision." Pet. i (emphasis added). The Court, of course, "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," and this case—in which the Court expressly *limited* its grant of certiorari to the question addressing judicial review—plainly is not one of those "'most exceptional cases'" in which it would be appropriate to disregard that rule. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (quoting *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976)).

Nor is petitioner's current administrative argument one that is subsumed within the question presented in the petition. As the Court put it in very similar circumstances, the issue now argued by petitioner may be "*related* to the one petitioner[] presented, and perhaps [is] *complementary* to the one

petitioner[] presented, but it is not 'fairly included therein.'" *Yee*, 503 U.S. at 537. Thus, both the judicial review question actually presented in the petition and the administrative point that petitioner now argues "might be subsidiary to a question embracing both"—that is, whether the Waukesha system complies with the First Amendment—"but they exist side by side, neither encompassing the other." *Ibid.* See, *e.g.*, *American Nat. Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 608 (1985).

There is, moreover, no compelling need for the Court to address the nuances of Waukesha's administrative process. The constitutional requirements governing the administration of municipal licensing schemes are settled, and "[t]he lower courts have not reached conflicting results" on the application of those requirements. *Yee*, 503 U.S. at 537. But "[t]hey *have* reached conflicting results over" the *judicial* role in reviewing administrative licensing decisions. *Id.* at 538 (emphasis added). That, presumably, is why the Court granted review in this case, and it would be appropriate for the Court to confine its decision to the resolution of that conflict.[2]

Second, the issue presented here is one of enormous practical importance to States and municipalities across the Nation. The Court has repeatedly

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[2] In addition, as respondent also explains, this case appears to be moot because petitioner's injury would not be remedied were it to prevail in this Court. We note that a petition raising an issue identical to the one presented here is pending in *Harkins* v. *Greenville County*, 533 S.E.2d 886 (S.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3176 (U.S. Sept. 8, 2000) (No. 00-375). That case, which presents a pre-enforcement, facial challenge to a municipal licensing ordinance, would provide a suitable vehicle for the resolution of the question presented here if the Court dismisses this case on mootness grounds.

noted the efforts by municipalities to address the problems of crime, declining property values, and other aspects of urban blight that often accompany sexually oriented businesses. See, *e.g.*, *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). As the substantial volume of litigation raising the issue presented here suggests,[3] many cities have responded to these problems by enacting licensing schemes very similar to the one employed in Waukesha. But although these licensing ordinances provide for judicial review of licensing decisions, they generally do not, and could not, require judicial resolution of challenges to license denials by a date certain. "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000) (footnote omitted). This means that petitioner's approach would invalidate "city ordinances on the basis of the swiftness or slow-

[3] See *11126 Baltimore Blvd., Inc.* v. *Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir.), *cert. denied*, 516 U.S. 1010 (1995); *Chesapeake B & M, Inc.* v. *Harford County*, 58 F.3d 1005 (4th Cir.), *cert. denied*, 516 U.S. 1010 (1995); *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc.* v. *City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *East Brooks Books, Inc.* v. *City of Memphis*, 48 F.3d 220, 225 (6th Cir.), *cert. denied*, 516 U.S. 909 (1995); *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101-1102 (9th Cir. 1998); *Boss Capital, Inc.* v. *City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000); *Lady J. Lingerie, Inc.* v. *City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000); *Harkins* v. *Greenville County*, 533 S.E.2d 886 (S.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3176 (U.S. Sept. 8, 2000) (No. 00-375).

ness of that particular state's judicial procedures." *Id.* at 897 (Merritt, J., dissenting).

As a result, the rule contended for by petitioner would render unconstitutional a very substantial body of municipal legislation, an outcome that would cause substantial disruption across the country. At the same time, local governments would lose the flexibility that the Court has recognized as important in addressing local problems that take widely varying forms. See *Renton*, 475 U.S. at 52; *American Mini Theatres*, 427 U.S. at 71 (plurality opinion). Fortunately, however, that outcome is not required here. Petitioner's argument is not supported by precedent; cannot be justified by the constitutional principle that underlies the Court's decisions in this area; and is inconsistent with the First Amendment rules governing the regulation of adult businesses generally. The decision below upholding the Waukesha ordinance accordingly should be affirmed.

A. *FW/PBS* Does Not Require The Prompt Resolution Of Judicial Challenges To License Denials

1. It is common ground between the parties in this case that a classic prior restraint, in which government officials are given substantial discretion to suppress speech that they dislike, must be subjected to the most rigorous procedural requirements. That is the rule stated in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), where state law empowered officials to prevent the exhibition of films that they did not find to be "moral and proper." *Id.* at 52-53 n.1. The *Freedman* Court held that, for such a restraint to be valid, (1) "the burden of proving that the film is unprotected expression must rest on the censor"; (2) "the requirement cannot be administered in a manner which would lend an effect of finality to the censor's deter-

mination whether a film constitutes affected expression," meaning that the censor either must issue a license "within a specified brief period * * * or go to court to restrain showing the film"; and (3) "the procedure must also assure a prompt and final judicial decision." *Id.* at 58-59. See *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (opinion of O'Connor, J.). Although the Court's decisions leave some ambiguity about the precise nature of this "prompt" judicial review requirement where censorship schemes like the one considered in *Freedman* are at issue, we recognize that there is some support for the proposition that such schemes will satisfy the constitutional mandate only if they provide for "a final judicial determination on the merits within a specified, brief period." *Blount* v. *Rizzi*, 400 U.S. 410, 417 (1971).[4]

In *FW/PBS*, however, the Court appeared to take a different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue. Justice O'Connor's lead opinion for three Justices in *FW/PBS* did not indicate that there must be a prompt judicial "determination" or "immediate"

[4] See *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (State must provide "immediate appellate review"); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141, 142 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963) ("an almost immediate judicial determination of the validity of the restraint"). Other decisions, however, have not appeared to contemplate the same immediacy in the judicial review process. See, *e.g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 771 (1988) (referring to "relatively speedy" judicial review); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975) ("a prompt final judicial determination must be assured"). Indeed, *Freedman* itself emphasized that the Court did "not mean to lay down rigid time limits or procedures." 380 U.S. at 61.

judicial review, as *Freedman* and its progeny required. Instead, Justice O'Connor's opinion indicated that the licensing regime must provide only for "the *possibility* of prompt judicial *review*." 493 U.S. at 228 (emphasis added). Justice O'Connor repeated this formulation throughout her opinion. See *id.* at 229 (referring to "an *avenue* for prompt judicial review") (emphasis added); *id.* at 230 (referring to "the *availability* of prompt judicial review") (emphasis added). This approach seems to contemplate a regime in which it is sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license.[5] Lower courts accordingly have read this language to permit—and municipalities have relied upon it in enacting—licensing ordinances that comply with the judicial review requirement by providing nothing more than "*access [to] the courts* within a brief period." *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) (emphasis added) (Higginbotham, J.).[6]

[5] Justice Brennan, writing for three Justices in *FW/PBS*, would have held that *all* of the procedural safeguards identified in *Freedman* must be provided in the adult business context (493 U.S. at 239 (Brennan, J., concurring in the judgment)); in contrast, Justice White and then-Justice Rehnquist were of the view that *Freedman* was *wholly* inapplicable in this setting (*id.* at 244 (opinion of White, J.)), as was Justice Scalia under a different rationale (*id.* at 250 (opinion of Scalia, J.)). In this context, the departure from *Freedman* undertaken by Justice O'Connor's opinion commanded majority support in the Court.

[6] Accord *Boss Capital*, 187 F.3d at 1256; *Graff* v. *City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994); *Grand Brittain*, 27 F.3d at 1070; *Jews for Jesus, Inc.* v. *Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). But see *Nightclubs, Inc.*, 202 F.3d at 892; *Baby Tam & Co.*, 154 F.3d at 1101-1102; *11126 Baltimore Blvd.*, 58 F.3d at 998-1001; *East Brooks Books*, 48 F.3d at 225.

That the lead opinion in *FW/PBS* believed the First Amendment to be satisfied in this setting by timely access to judicial review finds support in the authority cited by Justice O'Connor. In describing the judicial review requirement, Justice O'Connor's opinion pointed not only to *Freedman* and *Skokie*, but also to *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). There, the Court referred to the "*availability* of expeditious judicial review" (*id.* at 155 n.4 (emphasis added)), illustrating the meaning of that phrase by reference to Justice Harlan's *Shuttlesworth* concurrence and Justice Frankfurter's concurring opinion in *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). Those opinions, in turn, found it sufficient that the applicant for a permit was able to "invoke relief by way of mandamus or certiorari." *Id.* at 420 (Frankfurter, J., concurring in the result). See *Shuttlesworth*, 394 U.S. at 162 n.4 (Harlan, J., concurring) ("Since the time remaining [before a scheduled event for which a license was sought] was sufficient to obtain relief by way of mandamus, there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure."). These avenues for review do not impose absolute time limits for judicial decision.

2. In addition, the conclusion of a majority of the Justices in *FW/PBS* that the *Freedman* test does not in all respects govern the licensing of adult businesses establishes that the First Amendment does not, in this context, require a fixed date for the resolution of judicial challenges to license suspensions. In particular, Justice O'Connor's lead opinion held that, because regulation of the licensing of sexually oriented businesses is not "presumptively invalid" (493 U.S. at 229), *Freedman*'s requirement that *the censor* initiate judicial proceedings is inapplicable in

the adult business context.[7] The requirement that the censor go to court, however, was an essential premise for *Freedman*'s further insistence on the prompt completion of judicial review—meaning that the abandonment of the former requirement necessarily affects the application of the judicial review mandate to the licensing of sexually oriented businesses.

The Court explained in *Freedman*:

> [W]hile the State may require advance submission of all films, * * * *the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression.* * * * [O]nly a procedure requiring a judicial determination suffices to impose a valid final restraint. * * * To this end, the exhibitor must be assured * * * that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. *Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.* Moreover, we are well aware that, *even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor.* * * * *Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent*

[7] As noted above (at note 5, *supra*), three other Justices, who would have gone considerably farther, agreed in *FW/PBS* that this aspect of *Freedman* (among others) is inapplicable in the adult business setting.

effect of an interim and possibly erroneous denial of a license.

Freedman, 380 U.S. at 58-59 (emphasis added). The Court's holding in *Freedman* thus was that, where censorship schemes are at issue, the decision to prohibit expression may not have final effect absent a judicial decision; that any restraint imposed in advance of such a judicial decision may be only temporary; and that, because speech might be inhibited after the expiration of a temporary administrative restraint during the pendency of the required judicial review, a prompt final judicial decision must be assured "to minimize the deterrent effect of an interim" license denial.

This analysis, however, has no application where the licensing of adult businesses is concerned because in that setting a restraint on speech *may* become final in the absence of a judicial decision; denial of a license will be permanent unless the *applicant* decides to challenge the restraint in court. As a consequence, the administrative decision to deny a license to a sexually oriented business need *not* be only temporary. And this means that *Freedman*'s rationale for requiring a prompt judicial resolution—the concern that speech might be inhibited during the period between the expiration of a temporary administrative restraint and the rendering of the judicial determination that is *necessary* for the censor's decision to become final—has no bearing on schemes for the licensing of adult businesses, where a judicial decision is not a prerequisite for a license denial to become effective. It therefore is implicit in the analysis of the lead opinion in *FW/PBS* that licensing schemes for adult businesses need not impose rigid deadlines on the judicial review process.

B. First Amendment Principles Establish That Prompt Resolution Of Judicial Challenges To License Denials Is Not Necessary

As the preceding discussion suggests, more fundamental First Amendment principles, many of which were discussed by Justice O'Connor's opinion in *FW/PBS*, also indicate that a licensing scheme for sexually oriented businesses need not guarantee a prompt judicial decision when license denials are challenged. The decisions in which the Court has applied a requirement of expedited judicial review involved regulations of speech that were "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). These included, most prominently, cases presenting censorship schemes in which state officials passed judgment on the *content* of speech, as in *Freedman* itself. See, *e.g.*, *Freedman*, 380 U.S. at 52, 54-55; *Southeastern Promotions*, 420 U.S. at 552-53; *Bantam Books*, 372 U.S. at 66. Such restrictions present particular dangers because they permit the suppression of speech by officials who may disapprove of the ideas expressed or the means of expression; because even well-intentioned censors may be led into error by the fact that fully protected speech often is separated from expression that is legitimately subject to regulation (such as obscenity) "only by a dim and uncertain line" (*Bantam Books*, 372 U.S. at 66); and "[b]ecause the censor's business is to censor," meaning that state officials with responsibility for censorship may be insensitive "to the constitutionally protected interests in free expression." *Freedman*, 380 U.S. at 57-58.

In addition, the Court has suggested that a prompt judicial determination may be necessary when issuance of a permit or license is " 'contingent upon the

uncontrolled will of an official.'" *Shuttlesworth*, 394 U.S. at 151 (citation omitted). In such cases, as in the ones involving the censorship of content, "the prior restraint [is] embedded in the licensing system itself, *operating without acceptable standards*." *Southeastern Promotions*, 420 U.S. at 553 (emphasis added). Thus, "none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead, they involved censorship." *Boss Capital, Inc.* v. *City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000).

Ordinances like the one at issue here are quite different from the *Freedman* paradigm in a variety of material respects. *First*, as Justice O'Connor noted in *FW/PBS*, licensing schemes for adult businesses do not involve an assessment of the content of regulated speech, and therefore do not allow for the suppression of particular ideas. "Under [such an] ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). See *Boss Capital*, 187 F.3d at 1256 ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license."). Officials in Waukesha thus base their licensing decisions on objective factors such as the presence of minors, the construction of viewing booths, and the like, instead of on the substance of the applicant's expression.

Second, such licensing systems give local officials very limited discretion. Administrators are not permitted "'to roam essentially at will'" (*Shuttlesworth*, 394 U.S. at 153 (citation omitted)), or to exercise a judgment that has a large subjective component. Instead, municipal decisionmakers are directed to judge compliance only with a defined set of neutral and objective factors.

Third, as Justice O'Connor also explained in *FW/PBS*, the practical impact of a licensing regime for adult businesses differs significantly from that of the censorship system at issue in *Freedman*. The expense and delay inherent in challenging the suppression of a *single* movie or book in a given locality means that exhibitors or publishers may find it "too burdensome to seek review of the censor's determination." *Freedman*, 380 U.S. at 59. In contrast,

> [t]he license applicants under the [Waukesha] scheme ha[s] much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.

FW/PBS, 493 U.S. at 229-30 (opinion of O'Connor, J.). Because such an applicant is likely to "stick it out and see litigation through to its end," "[t]he need for a prompt judicial decision is * * * less compelling for licensing ordinances than for censorship schemes." *Boss Capital*, 187 F.3d at 1256.

Fourth, it bears at least passing note that the nature of the expression at issue here is considerably different from the speech that was constrained in

Freedman or *Shuttlesworth*. The Court has found it "'manifest that society's interest in protecting th[e] type of expression [sold by an adult business] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.'" *Renton*, 475 U.S. at 49 n.2 (quoting *American Mini-Theatres*, 427 U.S. at 70 (plurality opinion)). Cf. *California* v. *LaRue*, 409 U.S. 109, 118 (1972) ("we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries [documented at bars featuring nude dancing] were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater"). At the same time, it may be that the speaker's powerful (and almost purely) commercial interest in providing the materials that are available at a sexually oriented business, like the similar incentives underlying commercial speech, means that such expression is hardy enough to survive even if it is accorded diminished constitutional protection.

Against this background, First Amendment principles do not require the significant intrusion into state judicial processes that would follow from conditioning the constitutionality of licensing schemes for adult businesses on the guarantee of an immediate judicial decision when license denials are challenged. Because these licensing regimes are "not presumptively invalid" (*FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.)), there is no logical reason to insist that the judgment of the officials administering them be validated by an almost immediate judicial decision. The practical concern with the difficulty of challenging the censorship of *particular* films that underlay the promptness requirement in *Freedman* is not present here. And the assurance in this case that licensees may obtain access to the courts *prior* to the effectuation of a license cancellation means that temporary restraining orders or preliminary injunctions are available to prevent clear cases of abuse on the part of local officials. See *Nightclubs, Inc.*, 202 F.3d at 897 (Meritt, J., dissenting); *Grand Brittain, Inc.* v. *City of Amarillo*, 27 F.3d 1068, 1070, 1071 (5th Cir. 1994). This case therefore calls "for 'treating unlike things differently according to their differences'" (*Boss Capital*, 187 F.3d at 1256-1257 (citation omitted))—and thus for a departure from *Freedman*'s requirement of a prompt judicial decision.

C. Ordinances Requiring The Licensing Of Sexually Oriented Businesses Should Not Be Treated As Prior Restraints

The considerations discussed above are enough to dispose of petitioner's claims. But there also is a more fundamental defect in petitioner's argument that the *Freedman* requirement of a prompt judicial decision applies here: in our view, challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*.

The Court has treated the state regulation of speech as a prior restraint in cases where officials controlled expression on the basis of its content or had virtually unconstrained discretion to deny speakers a license or permit—situations where the regulation of speech had "the potential for becoming a means of suppressing a particular point of view." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). In contrast, the Court subjects limits on speech to the lower

level of scrutiny suitable for time, place, and manner restrictions when the State has not

> adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. * * * Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted). See, *e.g.*, *Heffron*, 452 U.S. at 649.

It is this latter analysis, suitable for content neutral regulations, that should govern licensing requirements for sexually oriented businesses. Such regulations plainly serve purposes that are "unrelated to the content of expression" and, because they are directed entirely at nonexpressive conduct (by, for example, limiting access to the business by minors or prohibiting sexual activity on the premises), are "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. As Justice White and then-Justice Rehnquist noted in their *FW/PBS* dissent, an ordinance like the one in Waukesha "does not regulate content and thus it is unlike the content-based prior restraints that the Court has typically scrutinized very closely. * * * [T]here is no basis for invoking *Freedman* procedures to protect against arbitrary use of the discretion conferred by [such an] ordinance." *FW/PBS*, 493 U.S. at 246 (White, J., dissenting).

To be sure, the content of speech is relevant to the Waukesha ordinance in one sense: the licensing scheme applies only to "adult oriented establishment[s]" (Waukesha Mun. Code § 8.195(2)), and such an establishment is identified by whether, among other things wholly unrelated to speech, it exhibits and sells films or periodicals that display any of a predictable list of defined sexual acts or portions of the anatomy. *Id.* § 8.195(1). In closely related contexts, however, the Court has made clear that such ordinances must be treated as *content* neutral because they are "aimed not at the content of the films shown at [the adult business], but rather at the *secondary effects* of such [businesses] on the surrounding community" (*Renton*, 475 U.S. at 47)—and that is so even if disapproval of the business was a subsidiary motivating factor in the enactment of the ordinance. *Ibid.* As the Court has explained, such an "ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 48.[8] This type of

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[8] Indeed, the state interest in a licensing ordinance like the one in Waukesha is particularly compelling because such regulations address dangerous and harmful activities that take place in the licensed establishment itself. As the court below explained, the violations committed by petitioner—involving minors loitering on the premises and sexual activity by patrons—raise concerns including "the transmission of AIDS and other sexually transmitted diseases and increased levels of criminal activity such as prostitution, rape and assaults." Pet. App. 37a. Cf. *LaRue*, 409 U.S. at 110-111 (describing activity at bars and nightclubs featuring nude dancing, which included prostitution, "[i]ndecent exposure to young girls, attempted rape, rape itself, and assaults on police officers").

ordinance is "properly analyzed as a form of time, place, and manner regulation" (*id.* at 46) because it "does not contravene the fundamental principle that underlies [the Court's] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial views.'" *Id.* at 48-49 (citation omitted). See *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1394 (2000) (plurality opinion).

As Justice White noted in *FW/PBS*, this conclusion applies with full force to the licensing of sexually oriented businesses: decisions like *Renton* "make clear * * * that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral." *FW/PBS*, 493 U.S. at 244 (White, J., dissenting). And under the analysis applicable to content neutral regulations, ordinances like the one in Waukesha must be upheld. Licensing decisions under the Waukesha ordinance do not turn on the content of the applicant's speech, and the ordinance does not in any way attempt to limit the permissible forms of expression at adult businesses. On its face, the ordinance is instead directed at combating "increased levels of criminal activities including prostitution" and other transient sexual acts, as well as at the preservation of property values. Waukesha Mun. Code § 8.195 (preamble). There can be no doubt that this interest in "seek[ing] to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood" (*Pap's A.M.*, 120 S. Ct. at 1393 (plurality opinion)) is a legitimate and important one "'that must be accorded high respect.'" *Renton*, 475 U.S. at 50 (citation omitted). And there has been no suggestion that the ordinance is overbroad,

or that its stated purposes are pretextual. See generally *Heffron*, 452 U.S. at 647-55. Settled doctrine therefore establishes the validity of the ordinance without regard to whether it provides for expedited judicial review—or any of the other accouterments of prior restraint analysis.

We say this with some hesitation, because we recognize that six Justices in *FW/PBS*, writing in two separate opinions, treated the Dallas ordinance there at issue as a species of prior restraint. See 493 U.S. at 225-30 (opinion of O'Connor, J.); *id.* at 238-41 (Brennan, J., concurring in the judgment). In our view, however, the issue is one that the Court could appropriately consider anew. Justice O'Connor's lead opinion in *FW/PBS* did not reach the question whether the ordinance was properly viewed "as a content-neutral time, place, and manner restriction" because the opinion concluded that "the city's licensing scheme lacks adequate procedural safeguards." *Id.* at 223 (opinion of O'Connor, J.). But the opinion never expressly addressed the threshold question whether there was a proper basis for applying the procedural safeguards designed for prior restraints, and did not respond to the dissenting views of Justice White on this point. Because there is no majority opinion in *FW/PBS*, because the lead opinion did not directly analyze whether the licensing of adult businesses is properly treated as a prior restraint, and because the assumption that underlies the outcome in *FW/PBS* is in tension with decisions such as *Renton*, it would be appropriate for the Court to revisit the issue.

It should be added that, far from imposing a prior restraint, the *application* of the Waukesha ordinance to petitioner does not present *any* First Amendment

issue at all. Petitioner's request for renewal of its license was denied because petitioner "permitt[ed] minors to loiter on the premises, fail[ed] to maintain an unobstructed view of the viewing booths and allow[ed] patrons to engage in sexual conduct inside the booths" (Pet. App. 7a)—all violations that "manifest[] absolutely no element of protected expression." *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). See Pet. App. at 37a-42a & nn. 13, 15 (describing petitioner's violations). As the Court observed in *Arcara*, when rejecting a constitutional challenge to the closure of an adult bookstore for virtually identical reasons, First Amendment issues arise only when the conduct triggering the closure had "a significant expressive element that drew the legal remedy in the first place * * * or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." *Arcara*, 478 U.S. at 706-07. See *id.* at 708 (O'Connor, J., concurring) ("Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment."). Because the conduct prompting the denial of petitioner's application had no expressive component, petitioner cannot challenge the ordinance as applied in this case.

CONCLUSION

The judgment of the Court of Appeals of Wisconsin should be affirmed.

Respectfully submitted,

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No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF COMMUNITY DEFENSE COUNSEL IN SUPPORT OF RESPONDENT, CITY OF WAUKESHA.

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INTEREST OF AMICUS*

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amicus Community Defense Counsel discloses that no counsel for any party in this case authored in whole or in part this brief. A monetary contribution to the preparation of this brief was received from the Alliance Defense Fund.

Community Defense Counsel (CDC) is a nonprofit law firm practicing exclusively in the area of adult business regulation on behalf of local communities. CDC serves the public interest through municipal league training seminars, legal resources, and litigation services. CDC has drafted hundreds of ordinances for municipalities across the country.

The crime, blight, and spread of disease caused by sexually oriented businesses are an ongoing concern for the local governments CDC serves. A narrowly tailored, content neutral licensing regulation furthers the substantial government interest of preventing such harmful effects. As *Amicus Curiae*, CDC's expertise would assist this Court in analyzing the relevant case law regarding this important decision. CDC files this brief in support of Respondent City of Waukesha and urges this Court to affirm the holding of the Court of Appeals of Wisconsin.

SUMMARY OF ARGUMENT

This facial challenge arises from a restraint imposed on a sexually oriented business *after* the business was found to have committed, in one year, nine violations of a content neutral licensing regulation. The City of Waukesha, Wisconsin ("Waukesha") did not renew City News & Novelty, Inc.'s ("City News") adult business license once it determined that City News violated Waukesha's adult business licensing ordinance by, *inter alia*, allowing customers to engage in sexual conduct inside booths allegedly reserved for viewing sexually explicit movies. *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 876 (Wisc. Ct. App. 1999). This

decision had nothing to do with the content of any protected speech; thus, the entire rationale undergirding the prior restraint doctrine (the prevention of censorship) is wholly absent from this case. The question presented here is whether, notwithstanding content neutral justifications for not renewing a license, communities must allow continued operation of harmful commercial enterprises during the entirety of judicial review.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), six Justices of this Court noted the critical distinction between content based review of speech and content neutral regulation of secondary effects. While failing to agree on the implications of such a distinction, the Court affirmed that municipalities may regulate sexually oriented businesses through content-neutral licensing ordinances. Specifically, cities may choose not to license, or revoke or not renew the license of, an offending business in the interest of preventing the harmful effects of the sexually oriented enterprise.

This case presents the opportunity to clarify the applicability of *Freedman* standards to a content neutral context in which the suppression of ideas is not at risk. This Court's decision should be guided by Justice O'Connor's plurality opinion in *FW/PBS*: "In *Freedman*, the censor engaged in direct censorship of particular expressive material .... Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.* at 229 (plurality). Under this distinction, the Waukesha ordinance should be examined as a content neutral regulation of expressive

conduct (operation of a commercial enterprise engaged in expression-related activity for profit) and subjected to intermediate scrutiny. This mode of analysis is jurisprudentially sound and logically consistent with an admittedly content neutral regulation.

If the Court concludes that the first two prongs of *Freedman* are nevertheless required, the Waukesha Municipal Code § 8.195 and the attendant administrative appeal statute, Chapter 68, Wisconsin Statutes, fully meet the *FW/PBS* plurality's procedural safeguard requirements. The city decides whether to issue or renew a license within a definite and reasonable period of time during which the status quo is maintained. Moreover, access to the Wisconsin state courts is immediately available following either the city's initial determination or the administrative appeal process under Wisconsin law.

Amicus urges this Court to hold that, at least in cases such as this where the business has previously been given a license, the enterprise's status quo should be maintained only during the term on the face of the license. The city's objective determination – here, upon evidence of judicial convictions and within 21 days – that ordinance violations justify nonrenewal is in no way a *prior* restraint. Rather, it is a sanction for prior misconduct and serves to prevent future harm to the public health, safety, and welfare. Requiring local ordinances to allow continued operation of violative businesses during administrative and judicial review would effectively neuter regulatory efforts to proactively control secondary effects. This is a situation that *Freedman*, with its focus on censorship of individual works, clearly did not envision.

For this reason, if the Court concludes that prompt judicial review is required on the facts of this case, the Court should hold that access to an independent judicial officer satisfies constitutional requirements. Because no ideas are being suppressed during such judicial review, the rigorous standards explicated in *Freedman v. Maryland*, 380 U.S. 51 (1965) are neither compelled nor deserved in this situation. *FW/PBS*, 493 U.S. at 229-30. "[N]o one is suggesting that licensing decisions are not subject to immediate appeal to the courts." *Id.* at 248 (White, J., and Rehnquist, C.J., concurring in part and dissenting in part). In a motion for a temporary restraining order or injunctive relief, judicial officers are compelled to assess the likelihood of success on the merits and commonly grant such relief pending trial on the merits.

Unlike the theater operators in *Freedman*, sexually oriented businesses have the monetary incentive to pursue an adverse licensing decision to the courts, diminishing even further the threat that any ideas would be suppressed. *Id.* at 230 (plurality opinion). The central concern of the First Amendment remains the free flow of content to its intended audience, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78-79 (1976) (Powell, J., concurring), and in this Information Age, content neutral regulations are no threat to that constitutional ideal.

This Court should affirm the Court of Appeals of Wisconsin's decision and recognize the *FW/PBS* plurality's opinion as this Court's standard regarding requisite procedural safeguards for SOB licensing ordinances.

ARGUMENT

I. The Rationale Behind Prior Restraint Does Not Apply to Content Neutral Regulations Designed To Prevent Secondary Effects, Especially Where the Restraint Occurs Not Prior To, But After The Ordinance Has Been Violated.

The history of the prior restraint doctrine shows that its purpose is prevent government control of expression – i.e., censorship. However, an ordinance that seeks to prevent crime and conduct inimical to the public health, safety, and welfare, by denying licenses to businesses recently found to have violated such content neutral standards, does not pose any risk of censorship. Indeed, City News operated for a period of years in the City of Waukesha, and was allowed to continue even after violating the ordinance. This fact, dismissed by Petitioner as "immaterial," Pet. Brief. at 10, is highly relevant because it demonstrates that Waukesha's purpose is not the suppression of disfavored expression, but rather the legitimate goal of preventing secondary effects. Waukesha's decision to not *renew* the license of an offending business is not then a *prior* restraint, but a sanction for past misconduct and a reasonable method of preventing future harmful secondary effects.

"The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding certain communications* when issued in advance of the time that such communications are to occur.'" *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, *Nimmer on Freedom of*

Speech § 4.03, p. 4-14 (1984) (emphasis added)). "Prior restraint arises where the content of the expression is subject to censorship." *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220 (10th Cir. 1990) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713, (1931)). The "two evils" of prior restraint, unbridled discretion and impermissible delay, are rooted in the government's ability to control what communications will be expressed – either through subjective standards that can be coercively applied or via excessive delays during which the subject communication is suppressed. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-27 (1990) (citing *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980); *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781 (1988)).

Six of the nine justices in *FW/PBS* concluded that enforcing general qualifications for persons seeking to operate sex-related businesses is a ministerial act that does not bear the "heavy presumption" that accompanies prior restraints. In the plurality opinion, Justice O'Connor, joined by Justices Stevens and Kennedy, explained:

> The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. In *Freedman*, the censor engaged in direct censorship of particular expressive material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in *Freedman*, was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once

> in court. Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid."

FW/PBS, Inc., 493 U.S. 215, 229 (1990) (plurality opinion).

Justice White, joined by Chief Justice Rehnquist, dissented from the Court's decision to invalidate the Dallas ordinance, explaining that prior restraint analysis did not apply because the law was designed to prevent secondary effects and not the dissemination of expression. Instead, *Renton* and *Young* governed:

> . . . The ordinance in no way is aimed at regulating what may be sold or offered in the covered business. With a license, operators can sell anything but obscene publications. Without one – without satisfying the licensing requirements – they can sell nothing because the city is justified in enforcing the ordinance to avoid the likely unfavorable consequences attending unregulated sexually oriented businesses.
>
> . . . [In *Freedman*], the board was approving or disapproving every film based on its content and its suitability for public viewing . . . As I have said, however, nothing like that is involved here; the predicate identified in *Freedman* for imposing its procedural requirements is absent in this case.

439 U.S. at 244-45 (White, J., dissenting).

Justice Scalia, noting that the Dallas ordinance "entails no risk of suppressing even a single work," eschewed prior restraint analysis and would have upheld the law as a constitutional means of preventing pandering. *Id.* at 262-63 (Scalia, J., dissenting).

This critical distinction between judging the content of speech and setting standards for persons operating historically problematic businesses has been properly applied by the courts under *O'Brien*, both before and since *FW/PBS*. *See*, *e.g.*, *Airport Bookstore v. Jackson*, 242 Ga. 214, 222-23 (1978) (upholding 5-year disability for persons convicted of sex-related offenses); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 710 (upholding disability provision as narrowly tailored and constitutional); *Tee & Bee, Inc. v. City of West Allis*, 936 F. Supp. 1479, 1487 (E.D. Wis. 1996) (finding sex-related civil disabilities reasonable and narrowly tailored); *DLS, Inc. v. City of Chattanooga*, 127 F.3d 403, 414-15 (6th Cir. 1997) (noting civil disabilities provision "does not allow City officials to exercise discretion by passing judgment on the content of the protected speech . . . . [T]he decision-maker . . . is constrained by objective criteria and the standards for licenses and permits under [the age and civil disability provisions] do not violate the constitution.")

The application of this distinction is even more appropriate in this case, where the decision at issue is not the denial of an *initial license application* because of prior criminal conduct, but rather a decision to not renew made *after* evidence is shown that the law has been violated. Thus, this case is more akin to this Court's rulings in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 n.2, 707 n.4 (1986) and *Alexander*, 509 U.S.

at 553. Because the content of expression is irrelevant to the City's decision, the rationale behind the prior restraint doctrine is wholly absent in situations like these, and the Court should apply the test for content neutral regulations of expressive conduct. *See U.S. v. O'Brien,* 391 U.S. 367, 377 (1968); *Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

II. If The First Two *Freedman* Standards Apply To Content Neutral Licensing Regulations, Waukesha Municipal Ordinance § 8.195 And Chapter 68, Wisconsin Statutes, Properly Read, Provide These Procedural Safeguards.

Waukesha denied City News's application to renew its adult business license because it found that City News had violated several provisions of Municipal Ordinance § 8.195. 604 N.W.2d at 876. "The violations included permitting minors to loiter on the premises, failing to maintain an unobstructed view of the viewing booths and allowing patrons to engage in sexual conduct inside the booths." *Id.*

These are the facts of the case. However, the opening pages of Petitioner's brief is devoted to cataloging a parade of hypothetical horrors that supposedly justify facial invalidation of the Waukesha ordinance. Pet. Brief. at 5-8 (claiming that the hearing can be continued repeatedly and indefinitely). None of these speculations justify invalidation of the ordinance in all of its applications.

A. Petitioners Mistakenly Presume Bad Faith Enforcement And Rely Upon Far-Fetched Hypotheticals To Justify Their Reading Of The Waukesha Ordinance

Petitioner's Statement of the Case paints a grave picture whereby City officials maintain the power to deny licenses through an intricate series of hidden delays and shadow deadlines. This presumption of bad faith on the part of local officials appears at various spots throughout the brief:

> For example, suppose a married man . . . watches a sexually explicit film in a video viewing booth. If this customer is under surveillance by an unscrupulous vice officer assigned the task of finding lewd conduct violations in an adult bookstore, it would not be at all surprising to find fabricated charges brought against the individual . . . .

Id. at 30.

Yarns such as these are nothing more than "highly speculative injuries," *FW/PBS*, 493 U.S. at 248 (White, J., concurring in part and dissenting in part) that are completely repudiated by the facts of this case.

Unlike the facial challenge initiated shortly after the passage of the Dallas ordinance, the instant lawsuit was filed long after the ordinance was passed, when City News faced nonrenewal. In "facial" challenges such as these, the Court should apply its analysis set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) ("As a threshold matter, it is far from clear that [the plaintiffs] should be permitted to bring a facial challenge to this aspect of the regulation.")

Since the justifications for nonrenewal under Waukesha's Ordinance are objective, it is clear that any "grant of discretion that [plaintiff] seeks to challenge here is of an entirely different, and lesser, order of magnitude, because

[plaintiff] does not suggest that city officials enjoy unfettered discretion to deny [licenses] altogether." *Ward*, 491 U.S. at 793-94.

Moreover, one cannot just *presume* bias and bad faith in a facial challenge to an ordinance; indeed, the required presumption is that regarding public officials, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *United States v. Armstrong*, 517 U.S. 456 (1996).

Applying these principles, the Court in *Ward* took notice of the City's application of its regulation, and though couched in broad language, concluded: "Even if the language of the [regulation] were not sufficient on its face to withstand challenge, our ultimate conclusion would be the same, for the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement." *Ward*, 491 U.S. at 795.

Waukesha's application of the Ordinance to Petitioners is relevant because the Ordinance's *history* diminishes the credibility, if any exists, of Petitioner's parade of horrors:

> Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for "in evaluating a facial challenge to a state law, a federal court must .... consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside*, 455 U.S. 489, 494, n.5 (1982); see *Plain Dealer*, 496 U.S., at 769-770, and n. 11; *United States v. Grace*, 461 U.S., at 181, n.10; *Grayned v. City of Rockford*, *supra*,

> at 110; *Poulos v. New Hampshire*, 345 U.S. 395 (1953). Any inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.

Ward, 491 at 795-796.

The Waukesha Ordinance provides the necessary *Freedman* safeguards on its face. In addition to the language of the Ordinance and Wisc. Stats. Ch. 68, however, this Court should rely on the City's implementation of its regulation and the Wisconsin Court of Appeals' authoritative construction of the same. As interpreted, applied, and construed, the Ordinance satisfies the procedural safeguards laid out in the *FW/PBS* plurality.

B. The Waukesha Ordinance Requires A Decision On A Renewal Application In A Specified and Reasonable Period Of Time During Which The Status Quo Is Maintained.

Your *Amicus* urges the Court to make a plain statement that, where licensing regulations are content neutral, the first prong of *Freedman* is satisfied if the status quo (pre-ordinance operation or operating with a license) of the business is maintained during the period in which the City makes its initial determination on an application.

In this regard, the Wisconsin Court of Appeals correctly construed the City's 21-day time limit and concluded:

> Through these provisions, a decision must be rendered at the very least thirty-nine days before the license is due to lapse. As the City points

> out, because the common council's review of an application is completed prior to expiration of the license, the status quo is automatically maintained. Therefore, because we do not read *FW/PBS* as requiring anything more than the effective preservation of the status quo during the period in which the licensor makes its decision, we conclude that the ordinance satisfies the constitutional safeguards.

231 Wis. 2d at 113.

The 21-day determination satisfies *FW/PBS*'s requirement that the status quo be maintained until the City renders a decision on the license application. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir. 1994) ("Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process.") Thus, the Court should not add the time for administrative appeal (approximately 50 days) to the 21 day time frame set by the City for getting back to the applicant with a final determination.

This conclusion is especially warranted here, where the decision to not renew is based on objective criteria and not a subjective determination as to the content of speech. Unlike *Freedman*, the suppression of ideas is not at issue, but rather the ability of the City to prevent future illegal and unsanitary conduct. Requiring the City to give an offending enterprise continued rights to operate for months would eviscerate the community's ability to control secondary effects and implement reasonable regulations for sex business operations.

While the *business* may choose to seek administrative appeal and not immediate judicial review, City News incorrectly

assumes that the original 21 days must be added to the administrative appeal process to arrive at a total of 71 days before a determination can be deemed rendered. However, "[N]o one is suggesting that licensing decisions are not subject to immediate appeal to the courts." *FW/PBS*, 493 at 248 (White, J., and Rehnquist, C.J., concurring in part and dissenting in part). As the *en banc* Seventh Circuit stated, "[a] person always has a judicial forum when his speech is allegedly infringed. . . . The 'safeguards' or the absence thereof neither expand nor detract from the courts' jurisdiction over constitutional questions." *Graff v. City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993) (*en banc*).

Nevertheless, City News concludes, "[A]s noted above, a renewal application is deemed timely if filed 60 days before the expiration of the license. Consequently, on its face, the ordinance fails to guarantee completion of administrative review of a timely filed renewal application before the currently-held license will expire."

This statement, which assumes the addition of administrative review days to the 21-day deadline for the City's determination, also fails to disclose the applicant's opportunities under the Ordinance. Section (7)(a), Renewal of License or Permit, states: "Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed *not later than* 60 days before the license expires." (emphasis added).

Of course, on its face, the Ordinance allows for a renewal application to be filed 75, 90, or even 120 days before the expiration of the currently-held license. *The fact that the applicant waits until the very last day to file his renewal application does not justify the invalidation of Waukesha's ordinance.* The operator of a sexually oriented business knows

whether violations justifying nonrenewal have been committed on his premises in recent months. (If he does not know, he is the type of operator that the City has an even stronger interest in holding accountable.) In any event, one who knows his license is subject to nonrenewal can anticipate that he will use the administrative appeal procedure, thus necessitating an earlier filing of his renewal application. An application filed 100 days prior to the expiration of the current license is just as, if not more, timely and also empowers applicants to avoid the parade of horribles imagined by Petitioner.

City News attempts to avoid this easy solution by repeating its argument that Chapter 68 allows for indefinite delays. This argument is foreclosed by the authoritative construction of the Wisconsin Court of Appeals:

> The ch. 68, STATS, framework for review provides a fixed timetable from the time of the municipal authority's initial determination to the date of the administrative review appeals board's decision. Contrary to City News's assertion, judicial review may not be delayed for an indefinite period of time . . . ."

231 Wis. 2d at 117. *See* Pet. Brief. at 9 (relying on Court of Appeals' decision as an authoritative construction: "While court convictions were offered in evidence in the current case, the ordinance on its face ad as specifically constructed by the Court of Appeals . . . .")

Because the city's review concludes prior to the license expiring, Municipal Code § 8.195 automatically preserves the SOB's status quo during the licensing period. The *FW/PBS* plurality's status quo requirement is therefore satisfied.

C. Any Prompt Judicial Review Requirement For Content Neutral Regulations Should Be Satisfied Through Access To An Independent Judicial Officer

After claiming at the outset of its brief that the definition of "prompt judicial review" is irrelevant to this case, on Page 7 City News seeks invalidation of the Waukesha Ordinance because "the duration of judicial review is itself essentially open-ended." Of course, this statement essentially seeks clarification of whether, in the context of content neutral licensing schemes, prompt judicial review requires access to the courts or a guarantee of a prompt judicial determination.

As stated above, a neutral SOB licensing ordinance is "significantly different from the censorship scheme examined in *Freedman*." *FW/PBS*, 493 U.S. at 229. *See also Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000) ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license"); *TK's Video*, 24 F.3d at 708 ("Licensing entails reviewing applications, performing background checks, making identification cards, and policing design, layout, and zoning arrangements. We are persuaded that Denton County's order creates less of a danger to free speech and requires a more time-consuming inquiry than screening movies.")

Where censorship is not involved, a content neutral regulation adequately protects constitutional rights by ensuring access to an independent judicial officer. As the Eleventh Circuit stated in *Boss Capital*:

> In sum, although *Freedman* appears to require prompt judicial resolution of censorship decisions, licensing decisions are different. We believe this is a situation for 'treating unlike things differently according to their differences.' *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999) (*en banc*). Accordingly, we agree with the First, Fifth and Seventh Circuits and hold that *access* to prompt judicial review is sufficient for adult entertainment licensing ordinances.

187 F.3d at 1256-57 (emphasis added).

Consequently, sexually oriented businesses should not receive a guarantee of continued operation pending full judicial determination because the potential for harm is substantial and the potential for content-based censorship is nonexistent where objective standards eliminate opportunity for unfettered discretion.

The rights of adult businesses appealing adverse licensing decisions based upon objective criteria are adequately safeguarded where the Ordinance affords "the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228. As stated by the Fifth Circuit, "the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. *A 'brief period' within which all judicial avenues are exhausted would be an oxymoron.*" *TK's Video*, 24 F.3d at 709 (emphasis added). Because that court found that "*FW/PBS* requires only a prompt judicial hearing," the municipality in question met the standard "by giving an unsuccessful license applicant 30 days to appeal to a district court . . . ." *Id.*

Notably, City News was afforded similar access to the Wisconsin courts. Under Chapter 68.12(1), Wisconsin Statutes, once the administrative appeals board issues its final determination, the appellant may seek immediate judicial review by filing a writ of certiorari within thirty days of the final determination. Hence, because Chapter 68, Wisconsin Statutes provides immediate access to the Wisconsin courts, it satisfies the *FW/PBS* plurality's judicial review requirement. As explained in *FW/PBS*, SOBS have enormous incentive to pursue administrative appeals and judicial review to its fullest. 493 U.S. at 230 ("Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.")

Furthermore, the enterprise's sole remedy does not lie merely with the municipal licensing ordinance and the appeals thereunder. The practical reality is that federal and state courts will swiftly hear alleged First Amendment violations. Indeed, under Canon 3 of the Code of Judicial Conduct, a judge has the duty to "dispose promptly" of any motion for temporary restraining order or preliminary injunction.

A suit accompanied by such a motion could be brought in federal court complaining under *Elrod v. Burns*, 427 U.S. 347, 373 (1976) that delay in administrative proceedings or in state court is causing irreparable harm due to the loss of First Amendment liberties. A hearing on a motion for temporary restraining order or preliminary injunction is judicial review and thus would more than satisfy this Court's precedent. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965). As the *en banc* Seventh Circuit stated, "[a] person always has a judicial forum when his speech is allegedly infringed. . . . The 'safeguards' or the absence thereof neither expand nor detract from the

courts' jurisdiction over constitutional questions." *Graff*, 9 F.3d at 1324.

Finally, the subordinate First Amendment value of enterprises selling raw sexual material further counsels against guaranteeing "adult" businesses the right to operate in violation of content neutral regulations pending judicial review. This Court has on several occasions distinguished the protection received by core political, social, and religious expression and the marginal protection received by sexually graphic commerce. *See, e.g., Young,* 427 U.S. at 61 ("[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance"); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (quoting *Young*, 427 U.S. at 70-71 (plurality)) (also cited in *City of Erie v. PAP'S A.M.*, 529 U.S. 277, 281 (2000)) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"); *City of Erie*, 529 U.S. at 278 (describing public nude dancing as expressive conduct, "although we think that it falls only within the outer ambit of the First Amendment's protection"); *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (plurality); *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

This Court has on more than one occasion recognized that government may afford different levels of protection to content-defined classes of speech. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court held that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is *justified* without reference to the

content of the . . . speech . . . ." *Id.* at 389 (internal quotation marks and citations omitted).

As even *Amicus* Florida Cannabis Action Network, Inc. stated, "[i]t would be a sad event in First Amendment jurisprudence if the Constitution were construed to say that core political speech – the very speech for which the First Amendment was added to the Constitution – enjoyed no more protection than sexually explicit, commercially exploited speech." *Brief Amicus Curiae*, Florida Cannabis Action Network at 8.

CONCLUSION

The procedural requirements of the prior restraint doctrine, rooted in efforts to prohibit content based censorship of speech, should not apply to content neutral licensing regulations that advance substantial government interests. In the event that they do apply, the City of Waukesha's ordinance provides a decision with a specified and reasonable period of time in which the status quo is maintained. Similarly, it provides for prompt judicial review under this Court's requirements in *FW/PBS.*

Accordingly, this Court should affirm the judgment of the Court of Appeals of Wisconsin.

Respectfully submitted,

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